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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

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84 6446

WILLIE LLOYD TURNER,

Petitioner,

v.

GARY BASS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a capital murder case is being tried in a rural county in a state where the death penalty has historically been imposed in a racially discriminatory manner, and where the death sentence is being sought for a black man who is accused of killing a white man, must the trial court grant the defendant's request that the prospective jury members be questioned about their racial prejudices?

2. Does "death qualification" result in a jury biased toward the prosecution on the issue of guilt, thereby depriving a defendant of his right to a fair and impartial jury?

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ASSIGNMENTS OF ERROR

1. The trial court's failure to voir dire the jury concerning their racial prejudices denied Petitioner his right to a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

2. The process of "death qualification" resulted in a jury biased in favor of the prosecution on the issue of guilt, denying Petitioner his right to a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), in that Petitioner alleges violations of rights guaranteed him by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents violations of the Sixth and Fourteenth Amendments to the United States Constitution, which are set out, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...

U.S. CONST. AMEND. VI.

> No State shall...deprive any person of life, liberty, or property, without due process of law...

U.S. CONST. AMEND. XIV.

STATUTES INVOLVED

The Virginia death penalty statutes, Va. Code Ann. SS 18.2-31 and 19.2-264.2 et seq. (1977 Supp.), are set forth in the appendix attached to this Petition.

STATEMENT OF THE CASE

Throughout this Petition for Writ of Certiorari, Petitioner will refer to the appellate record in the Fourth Circuit proceedings with the designation "App."

On July 12, 1978, W. Jack Smith was killed in the Town of Franklin, in the County of Southampton, Virginia. Petitioner

Willie Lloyd Turner was arrested and charged with capital murder, robbery, and using a sawed-off shotgun in the commission of a robbery. Because of prejudicial pre-trial publicity in Southampton County, the trial was moved to Northampton County, a thinly populated rural county on Virginia's Eastern Shore. The trial began on December 3, 1979. On December 4, 1979, the jury found Petitioner guilty of all charges. On December 6, 1979, the jury fixed his punishment at death. On February 6, 1980, Judge Godwin imposed the sentence of death upon Petitioner.

Petitioner's conviction and sentence were affirmed by the Virginia Supreme Court, Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), cert. denied, 451 U.S. 1011 (1981).

Petitioner's Petition for Writ of Habeas Corpus in the Circuit Court for the County of Southampton was denied, without an evidentiary hearing, and the Virginia Supreme Court refused the appeal. This Court denied a Petition for Writ of Certiorari. Turner v. Morris, cert. denied, ___ U.S. ___, 77 L.Ed.2d 1341 (1983).

On July 27, 1983, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Virginia, Norfolk Division, the Honorable John A. MacKenzie, presiding. Judge MacKenzie heard argument, denied Petitioner's motion for an evidentiary hearing, and entered an order dated May 23, 1984, denying relief but granting a certificate of probable cause. Petitioner then filed a Motion to Alter or Amend the Judgment, which was denied by order dated July 19, 1984.

The Fourth Circuit Court of Appeals affirmed the District Court's judgment by order dated January 25, 1985. The Fourth Circuit also stayed the issuance of the mandate until March 17, 1985. An application has been made for a stay of execution pending this Court's disposition of this Petition for Writ of Certiorari. An execution date has been set by the Circuit Court for the County of Southampton for May 2, 1985.

STATEMENT OF FACTS

On July 12, 1978, Willie Lloyd Turner, a black man, walked into Smith Jewelers in Franklin, Virginia, in the County of Southampton. Brandishing a sawed-off shotgun, he demanded that the proprietor, W. Jack Smith, a white man, fill up some bags with jewelry. Smith triggered the silent alarm, and moments later Officer A. D. Bain, Jr., arrived. Officer Bain walked in, unsuspecting; Turner then disarmed him and told him to stand in the back of the store with the rest of the customers who had been in the store at the time that Turner walked in. At Turner's order Smith began to fill bags with jewelry (App. 647-648), when Turner apparently became concerned about the possibility that other police officers would come in the back. He fired a pistol shot into the back wall of the store (App. 564). Officer Bain tried to reassure Turner that no police officer was going to come in the back; Bain testified that, at that point, Turner stated that "if he saw or heard any more police officers, he was going to start killing. About that time, I heard a siren go off." App. 648-649. Turner apparently panicked, and fired Bain's service revolver at Smith, the shot grazing Smith's scalp (App. 639). Smith fell to the floor.

In the confusion, one customer and one employee were able to sneak out the front door. Bain tried to talk to Turner, but Turner merely got angry. He said "I'm going to kill that nigger for snitching on me." (App. 569), and he shot Smith, who was lying on the floor, twice through the chest from the back. The two shots were fired in rapid succession, one right after the other (App. 652). Either of the two shots to the chest would have been fatal (App. 642). As Turner turned away from Smith, Officer Bain attacked him, disarmed him and placed him under arrest (App. 653).

After indictment, psychiatric evaluation, and a change of venue to Northampton County, Turner was brought to trial in December, 1979. The trial court conducted all voir dire, from written questions submitted by counsel. Turner's counsel submitted a number of questions (App. 8-9), including the following:

> (10) The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?

The Court refused to voir dire the venire on their racial attitudes, to which refusal counsel objected (App. 495).

During voir dire, defense counsel made repeated motions for more extensive voir dire; all such motions were denied. The defense counsel objected to "death qualifying" the jury (App. 486-488); the objection was overruled, the trial court did conduct death qualification and three jurors were excluded for cause under the authority of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

ARGUMENT

The major issue presented in this case is whether the trial court in a capital case must, upon timely motion, voir dire the jury as to possible racial prejudice.

Petitioner does not here claim that the Virginia death penalty statutes are unconstitutional because they are discriminatorily applied; the argument is much more narrow. Because the death sentence has historically been imposed in Virginia in a racially discriminatory manner, and because the jury's decision to impose the death sentence is not made merely by applying the law to the facts but also by acting as the conscience of the community, the courts must take affirmative steps to prevent the intrusion of racial prejudice into the decision-making process. Justice Powell (writing for himself, the Chief Justice, and Justices Blackmun and Rehnquist) indicated in his dissent in Furman v. Georgia, 408 U.S. 238, 450, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), that he agreed that the death penalty had in the past been applied in a discriminatory fashion. However, the dissent felt that the changes during the 1960's both in criminal procedure and in the extent of segregation made it inappropriate to strike down all of the statutes in the country on the basis of data accumulated over many years in a different legal and social climate.

The 19[illegible] dissent, therefore, impl[illegible]d that the process by which the death penalty is imposed is constitutional because, and only because, courts have taken steps to reduce the likelihood that racial prejudice will affect the death decision.

It is important to keep in mind the facts of this case, and to recognize that, when this case is compared with other capital murder cases, it would be characterized as a "mid-range aggravation" case, the type of case in which statistical studies indicate that racial prejudice is most likely to have an effect. This case is not a particularly heinous case -- it is basically a bungled robbery. In many jurisdictions in Virginia, a prosecutor would in all likelihood not even charge the crime as capital murder, and in any event would not seek the death penalty.[1]

I. VIRGINIA'S POST-FURMAN DEATH PENALTY STATUTES HAVE NOT ELIMINATED RACE AS A FACTOR IN THE JURORS' DECISION WHETHER TO IMPOSE DEATH.

Petitioner is a black man; his victim, W. Jack Smith, was a white man. The jury became aware of Mr. Smith's race when the Commonwealth introduced, through the medical examiner, a photograph (Commonwealth's Exhibit 10) of an entrance wound in Mr. Smith's head, a photograph (Commonwealth's Exhibit 11) of the exit wound from Mr. Smith's head, and a photograph (Commonwealth's Exhibit 12) of Mr. Smith's chest, showing two entrance wounds.[2] At trial, Petitioner requested the court to ask the prospective jurors the following question:

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[1] This statement is based upon simple observation, conversations with various prosecutors, and a comparison of the instant case with the other capital murders cases in which death was imposed. A review of those cases shows that the death penalty is not returned in Virginia in a case of murder in the course of a robbery unless there is more than one victim, see Stamper v. Commonwealth, 220 Va. 260, 256 S.E.2d 808 (1979), cert. denied, 445 U.S. 972 (1980); the robbery involves entry into a residence, see Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643 (1982), cert. denied, 460 U.S. 1029 (1983), or the method of killing was particularly gruesome or horrifying, see Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 643 (1979), cert. denied, 444 U.S. 1103 (1980).

[2] The defense objected to the photographs on the ground that they would inflame or prejudice the jury, but that objection was overruled. The Virginia Supreme Court affirmed. Turner v. Commonwealth, 221 Va. 513, 531, 273 S.E.2d 36 (1980), cert. denied, 451 U.S. 1011 (1981).

> The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?

The court refused to question the venire panel about racial prejudice.

A. The Death Penalty Has Historically Been Applied In A Discriminatory Fashion In Virginia.

There can be little question that, before Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the death sentence was being applied in Virginia in a racially discriminatory fashion.

Before the Civil War, the Virginia Code provided for different punishment for whites, free blacks and slaves.

> Virginia law at the outbreak of the Civil War divided criminals into three classes. For whites, the law authorized capital punishment only for murder, treason, and arson. Free Negroes could receive the death penalty for these three offenses plus rape and attempted rape, if the victim were white. In addition, the state could execute slaves for burglary, armed robbery, kidnapping and any other offense which was punishable by imprisonment for more than three years if committed by a free man.

Note, "Capital Punishment In Virginia," 58 Va. L. Rev. 97, 104-105 (1972).[3]

Following the Civil War and the enactment of the Fourteenth Amendment, the Virginia General Assembly abolished the clear race-dependent differences, added burglary, armed robbery,

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[3] The Virginia General Assembly in the 1800's considered the "death worthiness" of certain cases be a function not only of the race of the offender but also of the race of the victim.

> The statutes governing rape offenses were atypical, because there was a specific statute dealing with the rape of a white woman by a black man. This law provided that if a slave or free Negro raped a white woman he was to be punished with death. The original penalty for the attempted rape of a white woman by a black man was castration, but later the legislature extended the death penalty to cover that crime also. In contrast, the law offered little protection

rape and (in 1894) attempted rape to the list of capital offenses, and controlled jury selection to guarantee all white juries.

> Since the legislature apparently felt it impolitic to distinguish penalties by race, they made the death penalty discretionary for these crimes, and placed their trust in the judgment of white judges and white juries.

Id. at 106.

In 1908, Virginia executions were centralized in the Virginia State Penitentiary, and the Department of Corrections has kept records of those who have been executed since then. (No authoritative data exists for pre-1908 executions.) Between 1908 and 1962, 236 people were executed in Virginia; 202 were black. Forty-one blacks were executed for rape, fourteen blacks executed for attempted rape, and five blacks executed for armed robbery. No whites were executed for those three offenses. Id. at 142.

When all Virginia death sentences were nullified in 1972 in Furman v. Georgia, there were eight men on Virginia's death row; five were black and three were white. Six were on death row for murder, and two (both black) were on death row for rape. Id. at 113 n.107.

Even more striking are the statistics correlating the imposition of the death sentence with the race of the victim. Between 1908 and 1972, no one was executed for a crime against a black victim.

In sum, therefore, the disparity on the basis of race of the offender or race of the victim in the imposition of the death sentence in Virginia before Furman v. Georgia was "sufficiently large" that "it is unlikely that it is due solely to chance or accident," Casteneda v. Partida, 430 U.S. 482, 494

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[3] (Cont.)

> to a black woman raped by a white man. The maximum penalty was only a term of imprisonment, and Negroes were incompetent by statute to testify against a white criminal defendant. Without the testimony of the victim, proving such essential elements of the crime of rape as force and penetration would obviously present certain practical difficulties.

Id. at 104.

n.13, 97 S.Ct. 272, 51 L.Ed.2d 498 (1977) This statistical disparity, combined with the history of racial discrimination in Virginia's courts, fully supports a conclusion that, at least before 1972, racial prejudice was an important factor in determining who was sentenced to death in Virginia.

B. When This Court Struck Down Death Penalty Statutes In 1972, The Action Was Based In Part Upon Evidence That The Death Penalty Was Being Administered Disproportionately To Blacks.

When this Court struck down capital sentencing procedures in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), five justices addressed race discrimination in their individual opinions. See 408 U.S. at 249-52 (Douglas, J., concurring); id. at 309-10 (Stewart, J., concurring); id. at 364-66 (Marshall, J., concurring); id. at 389-90 n.12 (Burger, C.J., dissenting); id. at 449 (Powell, J., dissenting).

The thrust of the argument to this Court in 1972 was that the death penalty was being imposed on the basis of race; this conclusion was supported by many statistical studies. See, e.g., H. Bedau, The Death Penalty in America (1967 rev. ed.); Hartung, "Trends in the Use of Capital Punishment," 284 Annals Am. Acad. of Pol. & Soc. Sci. (1952); R. Clark, Crime in America 335 (1970); Wolfgang, Kelly & Nolde, "Comparison of the Executed and the Commuted Among Admissions to Death Row," 53 J. Crim. L. Criminology & Police Sci. 301 (1962). Justice Marshall summarized the statistics as follows:

> It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination.

408 U.S. at 364. See also W. Bowers, Executions in America (1974).

Even the dissenters in Furman apparently conceded that the death sentence had historically been imposed pursuant to a racially discriminatory pattern. Justice Powell, writing for himself, Chief Justice Burger, Justice Blackmun, and Justice Rehnquist, called the "discriminatory application of the death penalty in the past admittedly indefensible." 408 U.S. at 450.

C. Although The Post-Furman Statutes Better Channel Jury Discretion, They Have Not Eliminated Racial Prejudice From The Minds Of Jurors.

In 1976, this Court approved new statutes that guided the discretion of the jury so as to eliminate the arbitrary and capricious manner in which death was being imposed. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

Since Gregg, many statistical studies have correlated death sentences with the race of the victim and the race of the offender. The lower federal courts have rejected these claims on their merits, McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc); Shaw v. Martin, 733 F.2d 304 (4th Cir. 1984); Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983); petition for stay of execution denied, ___ U.S. ____, 78 L.Ed.2d 210 (1983); Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983), cert. denied, ___ U.S. ____, 79 L.Ed.2d 203 (1984); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979).

These decisions have been based in part upon doubts about the sufficiency of the evidence to support a conclusion of disparate impact, McCleskey, supra, at 896; Sullivan, supra, at 213, and in part upon a holding that a death-sentenced inmate must show an actual intent to discriminate or "evidence of disparate impact...so strong that that the only permissible inference is one of intentional discrimination." Adams, supra, at 1449; see McCleskey, supra, at 892.

In all of these cases, the courts have received evidence of statistically significant disparities in the imposition of the death sentence, showing that, for what ever reason, blacks are more likely to receive the death penalty than whites, and those who kill whites are more likely to receive the death penalty than blacks.[4]

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[4] In the proceedings thus far, Petitioner has introduced two studies tending to show that the death penalty is being imposed discriminatorily upon blacks, and in particular on blacks who kill whites. At trial, Petitioner introduced a study by Bowers and Pierce (Defendant's Exhibit 1) (App. 954-980); after having been denied an evidentiary hearing on this issue, Petitioner introduced as an exhibit to his Motion to Alter or Amend Judgment the study by Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing in Homicide Victimization 15-32 (unpublished study) (October, 1983) (App. 377-433).

However, Petitioner's argument here is not that the death penalty must be abolished because of the existence of racial discrimination, but rather that states must recognize the potential for racial discrimination, and must take reasonable steps to prevent it from affecting the capital trial.

In 1972, Justice Powell, writing for himself, Chief Justice Burger, Justice Blackmun, and Justice Rehnquist, wrote that

> ...discriminatory application of the death penalty in the past, admittedly indefensible, is no justification for holding today that capital punishment is invalid in all cases in which sentences were handed out to members of the class discriminated against....
>
> A final comment on the racial discrimination problems seems appropriate. The possibility of racial bias in the trial and sentencing process has diminished in recent years. The segregation of our society in decades past, which contributed substantially to the severity of punishment for inter-racial crimes, is now no longer prevalent in this country. Likewise, the days past when juries do not represent the minority group elements of the community. The assurance of fair trials for all citizens is greater today than at any previous time in our history. Because standards of criminal justice have "evolved" in a manner favorable to the accused, discriminatory imposition of capital punishment is far less likely today than in the past.

408 U.S. at 450. Four members of the court were saying, in essence, that procedural guarantees may be relied upon to prevent racial prejudice from infecting a trial to the extent that it had in years past.

Justice Powell was obviously correct in stating that the level of segregation has declined in recent years, as blacks and whites have broken down the barriers of segregation. This Court's rulings in the area of school desegregation have, themselves, probably done more than anything else to bring about a change in the attitudes of prospective jurors.

However, no one can seriously contend that the desegregation of our schools, or of our juries, has eliminated racial prejudice from our society or from the minds of those who are called to serve on our juries. Neither this Court's decision in Furman nor the statutes enacted in response abolished racism.

Had there been any doubt that racial prejudice continues to affect people's perceptions of the validity of the death penalty in a given case, those doubts should have been dispelled by recent events in Virginia. On October 12, 1984, Linwood Briley was executed in Richmond, Virginia, as hundreds of whites stood outside the Virginia State Penitentiary waving Confederate flags and nooses, chanting "Burn, Briley, burn," and "Fry, nigger, fry." The Richmond News Leader reported:

> But race was an issue for some who came out last night. Two women carried signs that said "Kill the Negro." A white youth spiced his screams of "Fry 'em" with racial epithets and obscenities.

"Prison Vigil: Street Divides Advocates, Opponents of Death Penalty," Richmond News Leader, October 13, 1984, at 1, col. 1. The Washington Post reported:

> Ron Doggett, 23, a landscaper, waved a Confederate flag over his head. "We want to return to the days in Richmond when this flag flew proudly," he said.

"Sorrowful, satisfied Crowds Greet Briley Execution in Va.", Washington Post, October 14, 1984, at A1, col.3, A12, col.3. At the execution of James Briley on April 18, 1985, the same crowd gathered, wearing Nazi armbands and shouting "White power" and "Sieg Heil."

Recognizing that there are such people in Virginia, all that Petitioner asks is that he be entitled to learn whether those people have been called for jury duty when he goes to trial.

D. In Virginia And Across The Country, The Death Penalty Is Still Being Applied Disproportionately Against Blacks Who Kill Whites.

The revision of death sentence statutes after Furman has not ended race discrimination. The evidence is clear that the same racially discriminatory application is occurring post-Furman. Bowers & Pierce, "Arbitrariness and Discrimination under Post-Furman Capital Statutes," 26 Crime and Delinquency 563 (1980); See, e.g., Bowers, "The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes," 74 J. Crim. L. & Criminology 1067 (1983); Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing

in Homicide Victimization 15-32 (unpublished study) (October, 1983) (introduced as an exhibit to Motion to Alter or Amend Judgment, App. 377-433).

At trial, Petitioner introduced a study by Bowers and Pierce (Defendant's Exhibit 1) (App. 954-980), showing the discriminatory manner in which the death sentence was being imposed in Georgia, Florida, Texas, Alabama and Ohio. In those five states, the probability of receiving the death sentence for homicide between the effective date of the various states' post-Furman statutes through December, 1977, was correlated with the race of the victim and of the offender. For example, the death sentence was imposed in 377 of 9,094 cases in which a white was killed, or 4.15% of the cases. The offender received the death sentence in 53 of 9,850 cases in which the death sentence was imposed, or .54% of the cases. In short, if someone kills a white, he is eight times more likely to receive the death sentence than if he kills a black. Similar aggregate totals may be computed for each of the offender/victim racial combinations:

	Estimated Number of Offenders	Persons Sentenced to Death	Probability of a Death Sentence
Black kills White	1,131	165	14.59%
White kills White	7,963	212	2.66%
Total -- White Victim	9,094	377	4.15%
Black kills Black	9,451	51	.54%
White kills Black	399	2	.50%
Total -- Black Victim	9,850	53	.54%
Total -- All Victims	18,944	430	2.31%

The numbers are similar if the class of cases is narrowed somewhat to include only felony-type murders.

	Estimated Number of Offenders	Persons Sentenced to Death	Probability of a Death Sentence
Black kills White	443	100	22.57%
White kills White	857	123	14.35%
Total -- White Victim	1,300	233	17.15%
Black kills Black	441	17	3.85%
White kills Black	50	2	4.00%
Total -- Black Victim	491	19	3.87%
Total -- All Victims	1,791	242	13.47%

This data reveals a very strong likelihood that the race of the offender and the race of the victim (and, in particular, the combination of those two variables) will have a very large effect upon whether a particular defendant receives the death sentence. This is true across the country, as the survey data from Georgia, Florida, Texas, Alabama and Ohio shows.

Bowers & Pierce did not study Virginia death sentences. However, Gross & Mauro did study the Virginia death sentences in nineteen cases, as compared to 1,389 homicides. The results, in rough statistical terms, show that one who kills a white is four times more likely to receive the death sentence than one who kills a black (2.3% to 0.5%). If a black kills a white, he has an 8.2% chance of receiving the death penalty; if a white kills a white, he has a 1.3% chance of receiving the death penalty; if a black kills a black, he has a 0.6% chance of receiving a death penalty; and no white has received the death penalty for killing a black since Virginia's new statute was enacted in 1977.[5]

Because the death penalty had been imposed in only 19 cases during the time period under study, Gross and Mauro were not able to label their data for Virginia statistically significant. However, Gross and Mauro found that Virginia's data was consistent with the data from other states - an observation which is also consistent with the observation that Virginians (despite their occasional protestations to the contrary) are basically the same kind of people, with the same kinds of prejudices, as other Americans. The fact that the data for Virginia is not statistically significant because of the small sample size is therefore not relevant - our claim is dependent upon human nature, not a particular statute. The sample size for all of Gross and Mauro's studies, as for all of Bowers and Pierce's studies, is more than adequate to show the disparate impact.

In any event, because we are not asking this Court to invalidate the Virginia death penalty statute, but rather only to

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[5] James Briley's execution on April 18, 1985, marks the first time in Virginia that anyone had been executed for murder of a black.

recognize that there are still people in this world who regard the death penalty as more appropriate for blacks who kill whites than for other combinations of offenders and victims, there is nothing about this argument that statute-specific or state-specific. There is nothing about the Virginia death penalty statute, as opposed to the statutes of North Carolina, South Carolina or any other state, which make it more or less likely that racial prejudice will motivate a juror to return a verdict of death. Nor can it seriously be suggested that the ethos of the citizenry of Virginia is significantly different of that of any other southern state.[6]

All of the data, taken together, show clearly that those who kill whites are far more likely to receive the death penalty than those who kill blacks.

There are currently 27 men on Virginia's death row; four have died while on death row (three by execution). Of those 31 men, 18 are black, one is Asian, one was Mexican and 11 are white.

The statistics just mentioned are admittedly not conclusive in Virginia to justify the drastic step of declaring the Virginia system to be unconstitutional. However, the data clearly indicate a tendency that courts must take active measures to counter. Courts must be vigilant to potential racial influences in a trial, and these influences must be eliminated wherever possible.

All of the evidence indicates, in virtually every sample of any size, that the death penalty is imposed disproportionately upon those who kill whites. Most analyses show that blacks are more likely to receive the death penalty than whites. See Gross & Mauro at 91-98. (App. 419-433.)

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[6] Or that of most other states across the country. Racism has long been a particular problem in the South, but is by no means unique to the South. The data offered at trial from Professors Bowers and Pierce (see App. 954) shows that racially discriminatory application was suggested in Ohio as well as in four southern states.

II. THE TRIAL COURT SHOULD HAVE QUESTIONED PROSPECTIVE JURORS CONCERNING RACIAL PREJUDICE.

This Court's decision in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), together with the other cases decided that day, may be interpreted as saying, in essence, that the death penalty is permissible because, and only because, the newly redrafted statutes effectively channel the discretion of the jury. This Court assumed in Gregg that the state trial and appellate courts would exercise stricter review of the jury-imposed death sentences; that review would be more searching than usual, and would be particularly attuned to suggestions of arbitrariness or prejudice.

The extra solicitude shown in capital cases was highlighted in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 793 (1978):

> 'The penalty of death is qualitively different' from any other sentence. [Woodson v. North Carolina, 428 U.S. 280, 305 (1976)]. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.

While the extra degree of reliability sought does not translate into any difference in substantive standards, it implies that courts will take greater procedural precautions. Where there is a way to avoid prejudice, it should be taken. If the "extra degree of reliability" means anything, it means that the courts should bend over backwards to make sure that possible elements of prejudice or discrimination are eliminated.

This Court has held that a defendant has a constitutional right to have veniremen examined on racial prejudice when there is some "special circumstance" about the trial that makes it likely that racial attitudes will be relevant. In Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973), this Court reversed a conviction of a black civil rights worker in South Carolina who had been charged with possession of marijuana. His defense was that he had been framed in retaliation for his civil rights activities. He had asked that the jury be

examined on racial attitudes, and that request was denied. The Court unanimously agreed that voir dire on racial prejudice was constitutionally required in this case but rejected the notion that voir dire should have been required on whether the jurors were biases against people who wore beards. The Court obviously did not regard the possibility of prejudice against those wearing beards to be a matter of constitutional significance; the Court referred to the history of racial discrimination and the protection given by the Fourteenth Amendment to blacks in particular in drawing the distinction.

In Ristaino v. Ross, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d (1976), the Court held that voir dire on racial prejudice was not constitutionally required, where the only factor that seemed to call for such voir dire was the fact that it involved a black defendant charged with armed robbery and assault upon a white security guard. The Court interpreted Ham as follows:

> By its terms Ham did not announce a requirement of universal applicability. Rather, it reflected an assessment of whether under all of the circumstances presented there was a constitutionally significant likelihood, absent questioning about racial prejudice, that the jurors would not be as 'indifferent as [they stand] unsworne.'

424 U.S. at 596.

The last decision by this Court of relevance is Rosales-Lopez v. United States, 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981), in which this Court held, as a matter of its supervisory powers over federal courts, that

> [f]ederal trial courts must make such an inquiry when requested by a defendant accused of a violent crime where the defendant and the victim are members of different racial or ethnic groups.

451 U.S. at 192. The court rejected the notion that there was a constitutional requirement for voir dire on racial attitude in that case, which involved a Mexican who was helping other Mexicans to illegally enter the United States.

> Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with [racial prejudice] amount to an unconstitutional abuse of discretion.

451 U.S. at 190.

The question, therefore, is whether there is any "special circumstance" that makes it likely that racial prejudice will be an issue in this case.

The Fourth Circuit rejected this contention:

> There must exist some special circumstance in the facts surrounding a particular case before such voir dire is constitutionally required. We are of opinion that the nature of the crime or punishment itself is not a special circumstance. Nor is the fact that the victim is white and the defendant black, as Ristaino specifically so held. We are also of opinion that the fact that a larger percentage of white victims' assailants are executed than are other races is not a special circumstance. "There is no constitutional presumption of juror bias for or against members of any particular racial ethnic groups."

Turner v. Bass, 753 F.2d 342, 345 (4th Cir. 1985) (citing Rosales-Lopez, supra, 451 U.S. at 190.)

Judge Phillips noted in his concurrence that he agreed with the ruling of the Fourth Circuit, though he would make clear that particularized data relating specifically to jury prejudice at the time and place of trial might well constitute grounds for voir dire on that issue.

A. Ristaino v. Ross Should Not Be Applied In Jury Sentencing Cases.

Massachusetts, the state where Ristaino v. Ross originated, is not a jury sentencing state. A Massachusetts jury determines only guilt or innocence. Only a handful of states, Virginia among them, retains jury sentencing in non-capital cases; all of the states with death penalties provide for at least a recommendation of sentence by a jury. In Virginia, a jury's recommendation can only be reduced; it cannot be increased.

Jurors perceive blacks and whites differently. In their classic study, Kalven & Zeisel noted that jurors tend to be less sympathetic to black defendants than to white defendants; less sympathetic jurors are more likely to convict, and are more likely to impose the death sentence. H. Kalven and H. Zeisel, The American Jury 210 (1966). Jury sentencing trials necessari-

ly involve asking the jurors to act as the conscience of the community in imposing punishment. They are not only applying facts to issues of law in determining guilt; they are also, to a certain extent, defining the law of punishment. When a jury is faced with a range of punishment from one day to ten years in jail, there are no strict legal standards governing their decisions. Whether the jury recommends one day in jail or 10 years in jail is a function of purely subjective impresisions of whether the jurors like, respect, trust, excuse, emphathize with, or take pity on a defendant. They are shaping very rough subjective standards into a collective community standard -- the conscience of the community. If that conscience reflects racial prejudice,[8] there is an unacceptably greater chance that the black defendant will be more harshly treated.

The Supreme Court has noted, see Gregg v. Georgia, 428 U.S. 151, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), that a sentencing jury must weigh retribution, deterrence, and other matters of social policy. These are proper concerns for a sentencing jury, and are irrelevant to any other decision that any other jury would be called upon to make. Ristaino v. Ross should not be applied to jury sentencing cases.

B. Ristaino v. Ross Should Not Be Applied In Capital Cases.

Petitioner has suggested above that a black defendant accused of a violent crime against a white should be allowed to voir dire the jurors on racial prejudice in any case in which the jury can recommend sentence. That argument is admittedly based upon abstractions of theory rather than statistics.

However, if this Court does not wish to go that far, the intermediate is simply to extend the guarantee of a fair jury to all those charge with capital murder.

This Court, in Rosales-Lopez, 451 U.S. at 190, held that

> an alleged criminal confrontation between a black assailant and a white victim...did not create a need of "constitutional dimensions"

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[8] Of course, racial prejudice is no more permissible in a juror merely because it is an attitude widely held in the community.

> to question the jury concerning racial prejudice. There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups.

From the tone of this Court's opinion in Rosales-Lopez v. United States, it appears likely that the defendant there made no attempt to introduce evidence to establish the likelihood of racial prejudice. In the absence of any evidence, and there being no presumption of racial prejudice, there was no basis in the record for any finding that the defendant was entitled to such voir dire.

Here, however, we are not asking the courts to indulge in a "presumption" of the prejudice; we ask only that actual evidence offered be considered. It appears from this Court's opinions in Rosales-Lopez and Ristaino that no evidentiary showing was made in support of "the presumption of juror bias." We do not ask this Court to assume anything, or to presume anything. We ask only that this Court look at the fact. We have introduced evidence in support of our claim, evidence that is credible, reliable, and unchallenged. No evidentiary hearing has yet been held on this issue. This case is therefore not governed by Ristaino and Rosales-Lopez.

Appellant prays this Court to fashion one of three rules:

1. That voir dire on racial attitudes is always to be granted in cases in which the jury sets sentence, upon proper request from the defendant and where the defendant and the victim were of different races; or

2. That voir dire on racial attitudes is always to be granted in capital cases upon proper request from the defendant where the defendant and the victim were of different races;[9] or

3. In this particular case, where a black has been accused of killing a white in a small rural community, with a trial to be held in a small rural community, and with enough

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[9] The Georgia Supreme Court apparently already regards this as its constitutional obligation. See Henderson v. State, 251 Ga. 398, 306 S.E.2d 645 (1983), citing Ham, supra, and Reid v. State, 129 Ga. App. 657, 200 S.E.2d 454, 455 (1973).

passion involved in the case that one change of venue has already been required, voir dire on racial prejudice on timely motion should have been permitted.

In either event, Appellant's conviction and sentence must be reversed, and this case must be remanded for a new trial.

In a capital case, in which the jury imposes the sentence, the decision to impose the death sentence is intended to be, and in fact becomes, an effort to gauge the communal sense of retribution. A majority of the justices of this Court have agreed that retribution is a valid penological purpose served by the death penalty. See Furman v. Georgia, 408 U.S. at 453 (Powell, J., dissenting) (joined by Burger, C.J., Blackmun, Rehnquist, JJ.); Gregg v. Georgia, 428 U.S. 153, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (Stewart, Powell, Stevens, JJ., concurring).

Virginia's "vileness" criterion is expressly intended to address the question of retribution. Whether the defendant's conduct was "outrageously or wantonly vile, horrible or inhuman" is a question that is intended to, and does in fact, focus the jury's deliberations on the degree of horror and revulsion which they feel about the crime and the defendant.

All across the South, blacks accused of crimes against whites have known all too often the power of racially motivated retribution. Within the legal system, this disproportionate sense of retribution has led to a wide disparity in sentencing, as jurors have valued white lives more than black lives.[10] Outside the court system, blacks all across the south were often lynched

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[10] The statistics cited in Argument I, supra, are disturbing as indicators of prejudice, but they to a certain extent obscure the rabid feelings held by some. Perhaps the classic statement of how racial prejudice affects the criminal justice system is provided by Raymond Fosdick, a student of southern police methods in the early 1900's. One Southern policeman told Fosdick that "if a nigger kills a white man, that's murder. If a white man kills a nigger, that's justifiable homicide. If a nigger kills a nigger, that's one less nigger." C. Silberman, Criminal Violence, Criminal Justice 124 (1978).

upon a mere accusation of murder, rape, or other crimes of varying degrees of severity against white victims.[11]

The analogy to lynching is not mere rhetorical excess; Justice Stewart suggested, in essence, that the death penalty, imposed by government, was a substitute for lynching:

> In part, capital punishment is an expression of society's moral outrage in particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.
>
> > "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people believe that organized society is unwilling or unable to impose upon criminal defenders the punishment they 'deserve,' then there are sown the seeds of anarchy - of self-help, vigilante justice, and lynch law."

Gregg, supra, at 183, quoting Furman v. Georgia, supra, at 308 (Stewart, J., concurring). The Virginia Supreme Court justified the death penalty for attempted rape (it will be remembered that only blacks have been executed in Virginia for attempted rape) by using the same analysis:

> The likelihood of the resort to lynch law, unless there is a prompt conviction and a severe penalty imposed, and thus a resultant grave shock to the peace and dignity of the Commonwealth, is well known to exist, almost, if not quite equally, in the case of an attempted as of a consummated rape.

Hart v. Commonwealth, 131 Va. 726, 747, 109 S.E. 582 (1921).

In the normal criminal trial, in which the judge sets the sentence, the jury has no cause to address itself specifically to the issue of retribution. In Ristaino v. Ross, the jury was only making a finding of guilt; they were not imposing sentence. They were asked to apply the law to the facts; their job

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[11] Of 4,733 lynchings recorded in the United States between 1882 and 1968, 72.7% of the lynchings were of blacks. In Virginia, 83 of 100 lynching victims were black. R. Zangrando, The NAACP Crusade Against Lynching, 1909-1950 5 (1980). As Zangrando notes, the statistics do not include "legal lynchings" in which the trial was a sham and a mere prelude to the foregone conclusion of execution. See Powell v. Alabama, 287 U.S. 45 (1932).

did not call for expressing retribution or declaring social or penological policy.

The jury is called upon in capital trials to make two essentially unreviewable and subjective judgments. First, the jury is asked to determine whether the "vileness" criterion is met, a determination not susceptible of precision. Second, even if the jury decides that either the "vileness" or the "future dangerousness" criteria has been met, the jury must then decide whether to impose the death sentence. In Virginia, the jury is given no guidance as to how it should weigh aggravating circumstances, mitigating circumstances, and simple mercy.

This Court sanctioned the necessity of turning a jury loose in a case in which an aggravating circumstance has been found; this Court held in Zant v. Stephens, ___ U.S. ___, 77 L.Ed.2d 235 (1983), that unguided discretion by a jury in cases that reach the top layer of the conceptual pyramid implicates no constitutional rights. With the candid acknowledgement that courts can only control what cases reach the top layer, without reviewing the decision-making within that top layer, this Court has recognized that death penalty juries are ultimately unrestrained in their weighing of retribution and other emotional factors. It is this ultimate weighing that results in a large number of blacks being given the death sentence. The courts, at trial and on appeal, can review every decision but that ultimate decision; courts can reverse for prejudicial error at every step but the last.

It is precisely this inability to know after verdict whether the verdict was the product of prejudice that makes it so imperative that capital juries be screened before trial.[12] This Court has called for a "greater degree of reliability" in capital cases because the punishment of death is unique in its finality.

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[12] The jurors were asked whether they knew "of any reason whatsoever why they could not try the case fairly and impartially"; but this cannot reasonably be argued to have been sufficient to ferret out prejudice resulting from racial prejudice. Since at the time the questions were asked the jurors had no idea of the race of Jack Smith, the general question would obviously be ineffective to prod the jury into asking themselves whether the race of the victim and the race of the offender would affect their judgment.

Lockett v. Ohio, 438 U.S. 586, 604-605, 98 S.Ct. 2954, 57 L.Ed.2d 793 (1978). If the "greater degree of reliability" means anything, it means that easy steps that can be taken to eliminate racial prejudice should be taken, particularly where counsel was sufficiently concerned about the possibility to request the voir dire.[13]

III. APPELLANT WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, BECAUSE THE JURY WAS "DEATH-QUALIFIED," RESULTING IN A VENIRE BIASED IN FAVOR OF THE PROSECUTION.

The process of "death qualification" was sanctioned by the United States Supreme Court in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). However, Witherspoon did not purport to dispose of all objections to death qualification.

> The data adduced by the Petitioner, however, are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt. We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a per se constitutional rule requiring reversal of every conviction returned by a jury selected as this one was.

391 U.S. at 517-518; see also id. at n. 11.

Accordingly, the issue of "prosecution proneness" remains open. This issue has recently been litigated in Grigsby v. Mabry, ___ F.2d ____ (8th Cir. 1985) (en banc) aff'g. 569 F. Supp 1273 (E.D. Ark. 1983), where the Eighth Circuit held that death qualification does result in a jury panel that is biased in favor of the prosecution on the issue of guilt, as well as sentence.

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[13] This Court has recognized that counsel's contemporaneous assessment of the need for a particular kind of questioning is relevant to an evaluation of the adequacy of a voir dire. Wainwright v. Witt, ___ U.S. ___, 83 L.Ed.2d 841, 858 (1985).

The Fourth Circuit has concluded to the contrary. Turner v. Bass, 753 F.2d 342, 347 (1985), Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984). In Keeten, the Fourth Circuit had reversed the district court finding that death qualification results in a guilt-prone jury, and the reversal was accomplished with virtually no discussion of the voluminous facts found by the United States District Court for the Western District of North Carolina. When Petitioner was in the District Court, Petitioner asked that he be permitted to prove his claim by presenting the record from Keeten v. Garrison in the District Court, and supplementing it with similar studies correlating the data to the Virginia experience. The court denied all requests for an evidentiary hearing.

At this juncture, Petitioner is in the posture of riding on the back of Grigsby v. Mabry. If this Court grants certiorari to review the Eighth Circuit's en banc opinion in Grigsby v. Mabry (on the assumption that the state of Arkansas intends to file a Petition for Writ of Certiorari), then Petitioner would simply ask this Court to hold his Petition for consideration at the same time as consideration is given to the Petition in Grigsby v. Mabry. Th issue presented is the same, and the issue is surely going to be fully and adequately presented, with a full record, in that case.

Accordingly, Petitioner would ask that this Court simply hold his Petition pending disposition of the Petition that is sure to come from the State of Arkansas in Grigsby v. Mabry.

CONCLUSION

This case is coming to this Court at almost exactly the same time as two other major death penalty cases, both of which involve factual records that are important to Petitioner's claims. Both of the claims that Petitioner has asserted in this Petitioner have as their predicate the facts that make up the record in these other cases. The first such case is McCleskey v. Zant, 753 F.2d 877 (11th Cir. 1985) (en banc), decided January 29, 1985. In McCleskey, the death-sentenced inmates offered extensive statistical evidence to establish the disparate impact

of the death sentence, in the hope that the federal courts would rule Georgia's death penalty statutes unconstitutional.

As noted above, Petitioner is not here arguing that the Virginia death penalty statute's disparate impact is sufficient to rule out all possibilities other than racial discrimination, and therefore does not argue that the Virginia death penalty statute must be declared to be unconstitutional; rather, Petitioner seeks only to have the court recognize that race may, in "mid-level aggravation" cases, affect the decision to impose the death sentence. McCleskey, supra, at 887.[14] Such a racial influence should be a subject for voir dire. Turner, therefore, does not go as far as the petitioners in McCleskey v. Zant, though Turner relies on much the same data base.

The second case is Grigsby v. Mabry, ___ F.2d ___ (8th Cir. 1985) (en banc), decided January 31, 1985, presenting the death-qualification issue. If this Court is to review the Eighth Circuit's ruling in Grigsby v. Mabry, then this Court should consider the arguments and facts advanced on behalf of the death-sentence inmates in that case, and apply them in this case as well. Turner is very frankly riding on the back of the efforts of the habeas petitioners inmates in Grigsby v. Mabry, and therefore requests that his case not be decided adversely to him unless and until a disposition has been made of the Petition for Writ of Certiorari surely being filed by the state of Arkansas.

Petitioner Willie Lloyd Turner prays this Court to grant his Writ of Certiorari, and to reverse his conviction and death sentence.

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[14] According to the statistical studies done by Professors Baldus and Woodworth:

> [T]he results showed a 6% racial effect systemwide for white victim, black defendant cases with an increase to 20 % in the mid-range of cases.

McCleskey, supra, at 887.

WILLIE LLOYD TURNER

By counsel

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CERTIFICATE

I J. Lloyd Snook, III, a member of the bar of this Court, do hereby certify that I sent one copy of this Petition for Writ of ~~Habeas Corpus~~ to this Court on April 24, 1985, and that I sent another copy of this Petition to Robert H. Anderson, III, Assistant Attorney General, 101 N. Eighth St., Richmond, Virginia 23219.

J. Lloyd Snook, III

Applied in Jenkins v. Commonwealth, 220 Va. 691, 255 S.E.2d 504 (1979).

§ 18.2-31. Capital murder defined; punishment. — The following offenses shall constitute capital murder, punishable as a Class 1 felony:

(a) The willful, deliberate and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit;

(b) The willful, deliberate and premeditated killing of any person by another for hire;

(c) The willful, deliberate and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;

(d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;

(e) The willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape;

(f) The willful, deliberate and premeditated killing of a law-enforcement officer as defined in § 9-108.1 H when such killing is for the purpose of interfering with the performance of his official duties; and

(g) The willful, deliberate and premeditated killing of more than one person as a part of the same act or transaction.

If any one or more subsections, sentences or parts of this section shall be judged unconstitutional or invalid, such adjudication shall not affect, impair or invalidate the remaining provisions thereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid. (Code 1950, §§ 18.1-21, 53-291; 1960, c. 358; 1962, c. 42; 1966, c. 300; 1970, c. 648; 1973, c. 403; 1975, cc. 14, 15; 1976, c. 503; 1977, c. 478; 1979, c. 582; 1980, c. 221; 1981, c. 607; 1982, 636.)

The 1981 amendment added subdivision g and the last paragraph.

The 1982 amendment substituted "a prisoner confined in a state or local correctional facility as defined in § 53.1-1 for an inmate in a penal institution as defined in § 53-291.1" in subdivision c.

Law Review. — For survey of Virginia law on criminal law for the year 1974-1975, see 61 Va. L. Rev. 1607 (1975). For survey of Virginia criminal procedure for the year 1975-1976, see 62 Va. L. Rev. 1412 (1976). For comment, "Virginia's Capital Murder Statute: An Assessment," see 63 U. Richm. L. Rev. 101 (1978). For survey of Virginia criminal law for the year 1976-1977, see 63 Va. L. Rev. 1399 (1977). For article, "Psychiatry and the Death Penalty: Evolving Problems in Virginia," see 66 Va. L. Rev. 167 (1980). For comment discussing possible effects on Virginia death penalty statute of recent United States Supreme Court decisions, see 67 U. Richm. L. Rev. 951 (1983).

Constitutionality. — [illegible] murder statutes are not unconstitutionally vague. Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 784, 100 S. Ct. 1331, 444 U.S. 1013, 62 L. Ed. 2d 741, 421 S. Ed. 2d 736 (1980).

The word "purpose" in subsection f of this section equates with intent, rather than motive. Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980).

In [illegible] this section [illegible] purpose [illegible] any prosecution thereunder, the death penalty may be imposed only where the Commonwealth proves beyond a reasonable doubt that the killing of a law enforcement officer was committed for the purpose of interfering with the performance of his official duties and not for any other motive. Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980).

The purpose of underlying language of subsection f of this section does not change the requirement that the motive is not an essential element of murder although proof of motive may be [illegible] intent in cases of circumstantial evidence. Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980).

The Commonwealth must prove that the accused was a convict at the time of the homicide in order to convict him of the murder [illegible] under this section. Brown v. Commonwealth, 132 Va. 696, 111 S.E. 312 (1922).

This section does not require proof that a defendant charged with murder during the commission of a robbery or a rape was a principal in the first degree to the crimes of

Whether to allow jury to separate is matter within trial judge's discretion. McFalls v. Peyton, 270 F. Supp. 577 (W.D. Va. 1967), cert. denied, 394 U.S. 951, 89 S. Ct. 1292, 22 L. Ed. 2d 486 (1969).

As to the exercise of the judge's discretion as to whether the jury should separate, it is to be remembered that the statutes or decisions of many states expressly allow the separation of the jury even in capital cases. Other states have provided the contrary. The practice has varied, with perhaps a slight present tendency in the more conservative direction. If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day. Rich v. United States, 330 F. Supp. 949 (E.D. Va. 1967), appeal dismissed, 447 F.2d 990 (4th Cir. 1968), cert. denied, 394 U.S. 993, 89 S. Ct. 1473, 22 L. Ed. 2d 769, rehearing denied, 395 U.S. 931, 89 S. Ct. 1777, 23 L. Ed. 2d 252 (1969).

Exercise of trial judge's discretion in absence of accused. — While it is true that whether to allow the jury to separate is a matter within the trial judge's discretion, it is not to be presumed that the discretion is to be exercised in a vacuum, in other words, in the absence of the accused in contravention of § 19.2-259. Near v. Cunningham, 313 F.2d 929, commented on in 21 Wash. & Lee L. Rev. 346 (1964).

Abuse of discretion. — In capital cases, where objection is interposed to the jury being permitted to separate after deliberations have been commenced, it may be an abuse of discretion, especially where no admonitions were given or where the inconvenience to the jurors is likely to touch upon their ability to give proper consideration to the case when they resume their deliberations. Rich v. United States, 330 F. Supp. 949 (E.D. Va. 1967), appeal dismissed, 447 F.2d 990 (4th Cir. 1968), cert. denied, 394 U.S. 993, 89 S. Ct. 1473, 22 L. Ed. 2d 769, rehearing denied, 395 U.S. 931, 89 S. Ct. 1777, 23 L. Ed. 2d 252 (1969).

Separation with consent of accused and Commonwealth. — Where the jury has been permitted to separate by the court upon the consent of the accused and the Commonwealth, prejudice will not be presumed in favor of the accused, and the burden will be upon him to show that the jury, during such separation, were guilty of misconduct to his prejudice. Powell v. Commonwealth, 182 Va. 327, 28 S.E.2d 687 (1944); Near v. Commonwealth, 202 Va. 20, 116 S.E.2d 85 (1960), cert. denied, 365 U.S. 872, 81 S. Ct. 907, 5 L. Ed. 2d 862 (1961), 369 U.S. 862, 82 S. Ct. 951, 8 L. Ed. 2d 19 (1962).

If prejudice is shown, it is grounds for a new trial in any case where the jury is permitted to separate and the jurors have been subjected to outside influence. This is equally true both for a criminal case and with respect to a civil case involving a de minimis amount. Rich v. United States, 330 F. Supp. 949 (E.D. Va. 1967), appeal dismissed, 447 F.2d 990 (4th Cir. 1968), cert. denied, 394 U.S. 993, 89 S. Ct. 1473, 22 L. Ed. 2d 769, rehearing denied, 395 U.S. 931, 89 S. Ct. 1777, 23 L. Ed. 2d 2521 (1969).

Separation of jury as grounds for habeas corpus. — In a petition for habeas corpus, accused was entitled to a hearing where it was alleged that, in the absence of the accused, the trial judge had exercised his discretion to allow the jury to separate during the trial and that thereafter the jurors mingled with the spectators and heard prejudicial remarks. Near v. Cunningham, 313 F.2d 929 (1963), commented on in 21 Wash. & Lee L. Rev. 346 (1964).

§ 19.2-264.1. Views by juries. — The jury in any criminal case may, at the request of either the attorney for the Commonwealth or any defendant, be taken to view the premises or place in question, or any property, matter or thing relating to the case, when it shall appear to the court that such view is necessary to a just decision. (Code 1950, § 8-216; 1977, c. 624.)

ARTICLE 4.1.

Trial of Capital Cases.

§ 19.2-264.2. Conditions for imposition of death sentence. — In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which

he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed. (1977, c. 492.)

Cross references. — As to review of death sentences by supreme court, see § 17-110.1. As to the priority given to review of death sentences, see § 17-110.2.

The numbers of §§ 19.2-264.2 through 19.2-264.5 were assigned by the Virginia Code Commission, the numbers in the 1977 act having been 19.2-264.1 through 19.2-264.4.

Law Review. — For survey of Virginia criminal procedure for the year 1976-1977, see 63 Va. L. Rev. 1408 (1977). For article "Psychiatry and the Death Penalty: Emerging Problems in Virginia," see 66 Va. L. Rev. 167 (1980). For survey of Virginia law on criminal procedure for the year 1978-1979, see 66 Va. L. Rev. 261 (1980). For a comment discussing possible effects on Virginia's death penalty law in the light of recent United States Supreme Court decisions, see 15 U. Rich. L. Rev. 951 (1981).

Constitutionality of article. — This article is not facially unconstitutional under the Eighth and Fourteenth Amendments. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979); Evans v. Commonwealth, 222 Va. 766, 284 S.E.2d 816 (1981), cert. denied, — U.S. —, 102 S. Ct. 1741, 72 L. Ed. 2d 155 (1982); Stamper v. Baskerville, 531 F. Supp. 1122 (E.D. Va. 1982).

Virginia's capital murder statutes are not unconstitutional. Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), cert. denied, 444 U.S. 1049, 100 S. Ct. 741, 62 L. Ed. 2d 736 (1980).

The death penalty under Virginia capital murder statute does not constitute cruel and unusual punishment nor deny a defendant due process or equal protection. Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979), cert. denied, 445 U.S. 972, 100 S. Ct. 1666, 64 L. Ed. 2d 249 (1980).

The statutory definitions of the two aggravating circumstances are not so vague as to vest the sentencing authority with standardless sentencing power. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979); Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980).

The fact that the statutory alternative to the capital penalty is one which permits parole does not mean that the sentencing authority is constitutionally overbroad. Mercy by parole is not unconstitutional. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979).

This section is not unconstitutionally vague. Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980).

The second clause of this section provides specific criteria which must be met before the death penalty can be imposed on the basis of this clause. The conduct in committing the offense must be deemed to be outrageously or wantonly vile, horrible or inhuman, and second, the jury must conclude that the conduct establishes one of the following: torture of the victim, an aggravated battery of the victim, or the perpetrator's depravity of mind. Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), cert. denied, 451 U.S. 1041, 101 S. Ct. 2347, 68 L. Ed. 2d 863 (1981).

Former statutes not presumptively unconstitutional. — The former death penalty statutes, enacted in 1975, were not rendered presumptively unconstitutional by decisions of the United States Supreme Court invalidating the death penalty statutes of other states. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979).

Retroactive application not unconstitutional. — The application of the 1977 death penalty law to a defendant who committed his crime while the 1975 death penalty law was in effect was not a violation of the ex post facto clauses of the State and federal Constitutions, since the 1975 law was presumptively valid, in spite of decisions of the United States Supreme Court invalidating the death penalty statutes of other states, and since the changes incorporated in the 1977 law are both ameliorative and procedural. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979).

The words "depravity of mind" as used in this article mean a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979); Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980).

The words "aggravated battery" as used in this article mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979); Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980); Whitley v. Common-

v. Commonwealth, 220 Va. 971, 266 S.E.2d 87 (1980), cert. denied, — U.S. —, 102 S. Ct. 1491, 71 L. Ed. 2d 693 (1982).

The court properly refused an instruction offered by the defendant which would have told the jury that if it could not reach agreement as to the appropriate punishment, the court would dismiss it and impose a life sentence. Justus v. Commonwealth, 220 Va. 971, 266 S.E.2d 87 (1980), cert. denied, — U.S. —, 102 S. Ct. 1491, 71 L. Ed. 2d 693 (1982).

Commonwealth could rebut defendant's closing argument. — Since in the sentencing stage of a capital murder trial, the prosecution has the burden of proving aggravating circumstances beyond a reasonable doubt, it was not improper to permit the Commonwealth's attorney to rebut the defendant's closing argument in the sentencing stage of the trial. Wave v. Commonwealth, 219 Va. 680, 251 S.E.2d 202, cert. denied, 442 U.S. 924, 99 S. Ct. 2850, 61 L. Ed. 2d 292 (1979).

Applied in Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979); Clanton v. Commonwealth, 222 Va. 41, 286 S.E.2d 172 (1982); Fitzgerald v. Commonwealth, 223 Va. 615, 292 S.E.2d 798 (1982).

§ 19.2-264.3. Procedure for trial by jury. — A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment for such offense as provided by law.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4.

If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty. (1977, c. 492; 1983, c. 519.)

The 1983 amendment, effective March 28, 1983, added the undesignated paragraph following subsection C.

Law Review. — For survey of Virginia criminal procedure for the year 1976-1977, see 63 Va. L. Rev. 1408 (1977). For article, "Psychiatry and the Death Penalty: Emerging Problems in Virginia," see 66 Va. L. Rev. 167 (1980). For a comment discussing possible effects on Virginia's death penalty law in the light of recent United States Supreme Court decisions, see 15 U. Rich. L. Rev. 951 (1981).

Constitutionality. — See note under § 19.2-264.2.

Failure to question jury as to bias in favor of death penalty. — In a prosecution for robbery and capital murder, the refusal by the trial judge to ask the jury whether, if the jury should happen to convict the defendant of capital murder, each juror would be able to consider voting for a sentence less than death, or to ask an equivalent question, was prejudicial error invalidating the sentence to death. Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981).

Instruction held erroneous. — Harmful, reversible error occurred in a capital murder prosecution when the trial court instructed the jury in such a manner that the jury could have believed that it could convict the defendant of capital murder though it was unable to determine who fired the fatal shots or if it determined that the defendant's brother fired the fatal shots; the error was compounded when the Commonwealth was permitted to argue to the jury that it could convict the defendant regardless of who pulled the trigger. Johnson v. Commonwealth, 220 Va. 146, 255 S.E.2d 525 (1979), cert. denied, 454 U.S. 920, 102 S. Ct. 422, 70 L. Ed. 2d 231 (1981).

Applied in Wave v. Commonwealth, 219 Va. 680, 251 S.E.2d 202 (1979); Justus v. Commonwealth, 220 Va. 971, 266 S.E.2d 87 (1980); Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980); Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980); Ball v. Commonwealth, 221 Va. 754, 273 S.E.2d 790 (1981); Quintana v. Commonwealth, — Va. —, 295 S.E.2d 643 (1982).

§ 19.2-264.4. Sentence proceeding. A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed ..... foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed ..... foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life. (1977, c. 492; 1980, c. 160.)

Law Review. — For survey of Virginia criminal procedure for the year 1976-1977, see 63 Va. L. Rev. 1408 (1977). For article, "Psychiatry and the Death Penalty: Emerging Problems in Virginia," see 66 Va. L. Rev. 167 (1980). For survey of Virginia law on criminal procedure for the year 1978-1979, see 66 Va. L. Rev. 261 (1980). For article, "The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation," see 66 Va. L. Rev. 427 (1980). For a comment discussing possible effects on Virginia's death penalty law in the light of recent United States Supreme Court decisions, see 15 U. Rich. L. Rev. 951 (1981).

(U.S. 1101, 100 S. Ct. 1069, 62 L. Ed. 2d 788 (1980).

The effect of a defendant's incarceration upon relatives is not a mitigating circumstance for the jury to consider. Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979), cert. denied, 444 U.S. 1101, 100 S. Ct. 1069, 62 L. Ed. 2d 788 (1980).

Instruction failing to advise death penalty not mandatory. — In the penalty trial phase of a prosecution for capital murder following rape, an instruction which failed explicitly to advise the jury that, even though it might find aggravating circumstances, the death penalty is not mandatory, while not artfully drawn, was not error, since, read as a whole, the instruction fairly expounded the thrust of the statute. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979).

Elimination for bias in favor of death penalty permitted. — The process of selection of an impartial jury permits elimination for cause of those veniremen who are biased in favor of the death penalty under all circumstances as well as those who are biased against its imposition under all circumstances. Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981).

And refusal to question jury as to bias invalidates sentence. — In a prosecution for robbery and capital murder, the refusal by the trial judge to ask the jury whether, if the jury should happen to convict the defendant of capital murder, each juror would be able to consider voting for a sentence less than death, or to ask an equivalent question, was prejudicial error invalidating the sentence to death. Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981).

Applied in Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116 (1979); Johnson v. Commonwealth, 220 Va. 146, 255 S.E.2d 525 (1979); Guarratano v. Commonwealth, 220 Va. 1064, 266 S.E.2d 94 (1980); Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980); Briley v. Commonwealth, 221 Va. 532, 273 S.E.2d 48 (1980); Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980); Ball v. Commonwealth, 221 Va. 754, 273 S.E.2d 790 (1981); Fitzgerald v. Commonwealth, 223 Va. 615, 292 S.E.2d 798 (1982); Quintana v. Commonwealth, — Va. —, 295 S.E.2d 643 (1982); Stamper v. Baskerville, 531 F. Supp. 1122 (E.D. Va. 1982).

§ 19.2-264.5. Post sentence reports. — When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate upon the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life. (1977, c. 492.)

Law Review. — For survey of Virginia criminal procedure for the year 1976-1977, see 63 Va. L. Rev. 1408 (1977). For article, "Psychiatry and the Death Penalty: Emerging Problems in Virginia," see 66 Va. L. Rev. 167 (1980).

Constitutionality. — See note under § 19.2-264.2.

Virginia's capital sentencing procedure statutes are not facially invalid on grounds that the death penalty is cruel and unusual punishment under the Eighth and Fourteenth Amendments. Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116, cert. denied, 444 U.S. 919, 100 S. Ct. 239, 62 L. Ed. 2d 176 (1979).

This section does not unconstitutionally discriminate against a capital defendant because its "good cause" provision imposes upon him a heavier burden in reducing a capital verdict than in reducing a noncapital verdict. Bassett v. Commonwealth, 222 Va. 844, 284 S.E.2d 844 (1981), cert. denied, — U.S. —, 102 S. Ct. 1996, 72 L. Ed. 2d 458 (1982).

The phrase "upon good cause shown" contained in this section merely reiterates the rule applicable in all cases, misdemeanor, felony, or capital, when the court must consider altering a jury verdict. The same criterion applies in capital as well as noncapital cases. Bassett v. Commonwealth, 222 Va. 844, 284 S.E.2d 844 (1981), cert. denied, — U.S. —, 102 S. Ct. 1996, 72 L. Ed. 2d 458 (1982).

Failure to interview parents or wife. — The defendant was not denied any statutory rights in the sentencing phase of his capital murder trial as the result of the probation officer's failure to interview the defendant's parents or wife. Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979), cert. denied, 445 U.S. 972, 100 S. Ct. 1666, 64 L. Ed. 2d 249 (1980).

A probation report which used information from a prior presentence report was not erroneously admitted at the sentencing phase of a capital murder trial where the proba-

Willie Lloyd TURNER

v.

COMMONWEALTH of Virginia.

Record No. 800375.

Supreme Court of Virginia.

Nov. 26, 1980.

The Circuit Court, Southampton County, James C. Godwin, J., convicted defendant of capital murder, possession of sawed-off shotgun, the commission of a crime of violence, and use of a firearm in the commission of a felony, and defendant appealed. The Supreme Court, l'Anson, C. J., held that: (1) trial court's refusal to question jurors individually out of presence of other prospective jurors and refusal to allow counsel-conducted voir dire was not an abuse of discretion; (2) trial court did not err in refusing to ask several questions proposed by defense counsel; (3) trial court did not err in questioning prospective jurors concerning their willingness to impose capital punishment and in striking prospective juror from venire; (4) trial court did not abuse its discretion in failing to sequester jury; (5) death penalty provisions were facially constitutional; (6) imposition of death penalty on basis of jury's conclusion regarding propensity for future crime was constitutional; (7) evidence was sufficient to support conclusion that defendant's conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery; (8) double jeopardy did not preclude conviction of use of firearm in the commission of a felony as well as murder in the commission of a robbery while armed with a deadly weapon; and (9) death penalty was properly imposed.

Affirmed.

1. Jury ⇐131(1)

Statute governing voir dire does not confer upon attorneys the unconditional right to question prospective jurors directly and thus does not conflict with rule which makes exercise of that right contingent upon trial court's approval. Code 1950, § 8.01-358; Supreme Court Rules, Rule 3A:20(a); Const. Art. 6, § 5.

2. Jury ⇐131(1)

While defendant has constitutional right to a fair and impartial jury, he has no constitutional right to counsel-conducted voir dire; in the absence of a statute or court rule to the contrary, as long as the selection procedure results in a fair and impartial jury, manner in which jury is to be selected is properly within trial court's sound discretion. Code 1950, § 8.01-358; Supreme Court Rules, Rule 3A:20(a); Const. Art. 6, § 5.

3. Jury ⇐131(13)

Trial court's refusal to question jurors individually out of the presence of other prospective jurors and the court's refusal to allow counsel-conducted voir dire did not represent abuse of discretion. Code 1950, § 8.01-358; Supreme Court Rules, Rule 3A:20(a); Const. Art. 6, § 5.

4. Jury ⇐131(2)

Unless refusal to ask question of prospective jurors amounts to denial of due process or otherwise impinges upon right to fair and impartial jury, trial court may use its discretion in determining whether to ask questions proposed by either Commonwealth or defendant. Code 1950, § 8.01-358; Supreme Court Rules, Rule 3A:20(a); Const. Art. 6, § 5.

5. Jury ⇐131(6)

Trial court's refusal to ask prospective jurors certain questions proposed by defense counsel concerning possible racial prejudice did not impinge upon defendant's right to a fair and impartial jury, even though defendant was black and victim was white. Code 1950, § 8.01-358; Supreme Court Rules, Rule 3A:20(a); Const. Art. 6, § 5.

6. Jury ⇐131(6)

While wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by de-

fendant, trial court's refusal to do so is not constitutionally objectionable in the absence of factors similar to those in United States Supreme Court's *Ham* decision; mere fact that defendant is black and victim is white does not constitutionally mandate such an inquiry. Code 1950, § 8.01-358; Supreme Court Rules, Rule 3A:20(a); U.S.C.A.Const. Amends. 5, 14.

7. Jury ⇐131(8)

Refusal of trial court to ask questions concerning circumstances under which prospective juror would vote for death penalty was not constitutionally objectionable, where voir dire questioning conducted by trial judge probed many of the areas touched upon by proposed questions and assured removal of those who would invariably impose capital punishment and where trial court's instructions to jury clearly delineated circumstances in which death penalty could be imposed.

8. Jury ⇐131(8)

Trial court did not err in questioning prospective jurors concerning their willingness to impose capital punishment.

9. Jury ⇐108

Trial court did not abuse its discretion in concluding that prospective juror's objections to capital punishment were absolute and that he should therefore be struck from venire.

10. Jury ⇐108

While jurors may not be excluded simply because they voice general objections to death penalty or express conscientious or religious scruples against its infliction, those jurors irrevocably committed to voting against death penalty may be excluded.

11. Criminal Law ⇐1158(3)

Trial court's determination that juror is irrevocably committed to voting against death penalty will not be disturbed on appeal unless court can say prospective juror's commitment against death penalty was not unmistakably clear.

12. Criminal Law ⇐854(2)

In the absence of any indication of pretrial prejudicial publicity, trial judge has wide discretion in deciding whether to sequester a jury.

13. Criminal Law ⇐854(1)

Mere fact of media coverage does not require judge to sequester a jury.

14. Criminal Law ⇐854(2)

Trial judge's discretion regarding sequestration extends to cases involving capital punishment.

15. Criminal Law ⇐1206(1)

Statutory provisions concerning death penalty are not facially unconstitutional. U.S.C.A.Const. Amend. 8; Code 1950, § 19.2-264.2.

16. Criminal Law ⇐1208(1)

A defendant's propensity for future criminal acts of violence is an acceptable consideration in determining whether to impose death penalty. Code 1950, § 19.2-264.2.

17. Homicide ⇐354

In prosecution for capital murder, evidence was sufficient to support conclusion that defendant's conduct in committing the offenses was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery. Code 1950, § 19.2-264.2.

18. Homicide ⇐354

In prosecution for capital murder, even if defendant's crime did not meet "vileness" standard of capital punishment statute, imposition of death penalty would have been permissible under "dangerousness" standard, as jury could have reasonably concluded that defendant would probably "commit criminal acts of violence that would constitute a continuing serious threat to society," in view of defendant's prior criminal record. Code 1950, § 19.2-264.2.

19. Criminal Law ⇐1177

Trial judge's refusal to ask jury members, either individually or collectively, whether their sentencing verdict was grounded upon "dangerousness" or "vileness" standard or both was not prejudicial error, although it would have accorded with

better practice if trial judge had determined with certainty basis for jury's sentence. Code 1950, § 19.2-264.2.

20. Homicide ⇐235

In prosecution for capital murder, evidence of asportation was sufficient to establish commission of robbery, even though defendant never had physical possession of jewelry bags personally, in view of evidence that defendant at gun-point commanded others to place money and valuables into jewelry bags owned by store. Code 1950, §§ 18.2-31(d), 18.2-32, 19.2-264.2.

21. Criminal Law ⇐161

Constitutional prohibition of double jeopardy consists of three separate guarantees: it protects against second prosecution for same offense after acquittal, it protects against second prosecution for same offense after conviction, and it protects against multiple punishments for the same offense. U.S.C.A.Const. Amend. 5.

22. Criminal Law ⇐1209

Constitutional guarantee against multiple punishments is limited to assuring that court does not exceed its legislative authorization by imposing multiple punishments for the same offense. U.S.C.A.Const. Amend. 5.

23. Criminal Law ⇐1209

Where two or more punishments for separate statutory violations are imposed in a single criminal proceeding, question of what punishments are constitutionally permissible is not different from question of what punishments legislative branch intended to impose. U.S.C.A.Const. Amend. 5.

24. Criminal Law ⇐200(1)

Double jeopardy clause of the United States Constitution did not preclude conviction of use of a firearm in the commission of a felony as well as murder in the commission of a robbery while armed with a deadly weapon. Code 1950, §§ 18.2-31(d), 18.2-53.1; 18 U.S.C.A. § 921.

25. Homicide ⇐354

Death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Code 1950, § 17-110.1, subd. C, par. 1.

26. Criminal Law ⇐1206(2)

In capital murder case, imposition of death sentence was not excessive or disproportionate to penalty imposed in similar cases. Code 1950, § 17-110.1, subd. C, par. 2.

27. Criminal Law ⇐122

Trial court did not abuse its discretion in denying defendant's motion for change in venue from county to which case had been transferred pursuant to previous change of venue, even though second motion for change of venue was not made until defense counsel learned of another case in the county involving death penalty and another murder in the area.

28. Criminal Law ⇐438(4, 5)

In capital murder prosecution, trial court did not err in admitting photographs of victim and crime scene.

29. Homicide ⇐311

In capital murder prosecution, trial court did not err in failing to give jury instruction concerning possibility of parole.

John C. Lowe, Charlottesville (J. Lloyd Snook, III; Thomas L. Woodward, Jr.; William R. Savage, III, Suffolk, Va., Lowe & Gordon, Charlottesville, Ltd., on briefs), for appellant.

Robert H. Anderson, III, Asst. Atty. Gen. (Marshall Coleman, Atty. Gen., on brief), for appellee.

Before I'ANSON, C. J., and CARRICO, HARRISON, COCHRAN, POFF, COMPTON and THOMPSON, JJ.

LAWRENCE W. I'ANSON, Chief Justice.

The defendant, Willie Lloyd Turner, was convicted of capital murder, Code § 18.2-

31(d)[1]; possession of a sawed-off shotgun in the commission of a crime of violence (robbery), Code § 18.2-308(A); and the use of a firearm (a pistol) in the commission of a felony (murder), Code § 18.2-53.1. The jury fixed Turner's punishment at one year in the penitentiary for violating Code § 18.2-53.1 and life imprisonment for violating Code § 18.2-308(A). In the second stage of the bifurcated proceeding conducted pursuant to Code §§ 19.2-264.3 and -264.4, the jury fixed the defendant's punishment for capital murder at death. At the conclusion of a separate sentencing hearing conducted pursuant to Code § 19.2-264.5, the trial court sentenced the defendant to death for capital murder and sentenced him in accordance with the jury's verdicts on the other two offenses. The defendant is here for an automatic review of the death sentence, consolidated with his appeal from his several convictions. Code § 17-110.1.

I. FACTS

On July 12, 1978, at approximately 11:30 a. m., Willie Lloyd Turner, a black male, entered a jewelry store owned and operated by W. Jack Smith, Jr., a white male. In addition to Smith, an employee (Mary Huffman) and a customer were present when Turner entered the store. After entering the store, Turner displayed a sawed-off shotgun previously concealed by a towel and demanded money and jewelry. Smith, while placing money and jewelry into the store's jewelry bags, triggered a silent alarm alerting the police department.

Judith R. Cosby and Police Officer Alan D. Bain, having entered the store without knowing a robbery was in progress, were detained in the store by Turner. Having discovered Smith had triggered a silent alarm, Turner demanded that Smith turn off the alarm. After acceding to Turner's demand, Smith, along with Cosby, began placing additional valuables designated by Turner into jewelry bags.

Near the rear of the store, Turner examined a revolver taken from Bain and fired a bullet toward the rear wall. Turner stated if he saw or heard any additional police officers, he was going to start killing those in the store. About that time, Bain heard a siren. Turner then walked from the back of the store toward the middle of the store, where Smith was stationed behind a counter, and fired a bullet from the revolver at Smith without warning. Smith, with blood on his temple, slumped behind the counter. Bain began talking with Turner, promising him to take him anywhere he wanted to go and asking him not to shoot again. While Bain talked with Turner, two occupants scrambled out the front door. After Turner told Bain he was going to kill Smith because he had triggered the silent alarm, Turner leaned over the counter and fired two bullets from the revolver into Smith's chest in rapid succession. Bain then grabbed and subdued Turner while Cosby ran out the front door. Smith died as a result of the bullets fired by Turner into Smith's chest.

II. JURY SELECTION AND SEQUESTRATION

Several of the defendant's assignments of error concern the manner in which voir dire was conducted. Over defense counsel's objections, the trial judge ruled that he alone would ask the questions of prospective jurors during voir dire. He also concluded that he would question jurors in groups of five, except when questioning jurors concerning their views on the death penalty. Although questioning concerning the death penalty occurred at least initially in groups of five, each prospective juror was required to answer individually at least two questions concerning capital punishment.[2] Prior

1. Code § 18.2-31(d) provides that "[t]he willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon" constitutes a capital murder.

2. Jurors were asked variations of the following questions: "Do you have any religious or conscientious scruples or objections against the imposition of the death sentence?" and "Do you feel that in each and every case, regardless of the facts, where a person is convicted of

to the day of trial, the court asked counsel for the Commonwealth and the defendant to submit questions they wished to have asked. Turner's counsel submitted a list of fifteen questions, nine of which were asked by the trial judge.

A. REFUSAL TO ALLOW COUNSEL-CONDUCTED VOIR DIRE

[1] The defendant contends that Code § 8.01-358 [3] gives both court and counsel an unconditional right to question prospective jurors directly and that the trial court abridged this statutorily created right by refusing to allow counsel-conducted voir dire. Citing Supreme Court Rule 3A:20(a),[4] the Commonwealth replies that the trial courts have discretion in determining whether to permit counsel-conducted voir dire.

The Constitution of Virginia, Art. VI, § 5, prohibits the promulgation of any court rule "in conflict with the general law as the same shall, from time to time, be established by the General Assembly." Supreme Court Rule 3A:20(a) clearly makes the right to counsel-conducted voir dire contingent upon the trial court's approval. In resolving the issue before us, we must determine whether Code § 8.01-358 confers upon attorneys the unconditional right to question prospective jurors directly. If Code § 8.01-358 confers such a right, it prevails over that portion of Rule 3A:20(a) which makes the exercise of that right contingent upon the trial court's approval.

The legislative history of § 8.01-358 is useful in discerning whether the General Assembly intended to confer such a right upon attorneys. The Code of 1887 § 3154 required trial courts to question prospective jurors when requested to do so by the litigants.[5] The Code of 1919 § 6000 enlarged a trial court's powers by providing that a court could question jurors even though not requested to do so by counsel.[6] The pertinent language remained unchanged for several decades. *See* Code of 1950 § 8-199 (1950). In 1966, the General Assembly amended Code § 8-199 to read as follows:

> "The court *and counsel for either party* may examine on oath any person who is called as a juror therein *and may ask such person or juror directly any relevant question* to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case."

murder he should receive the death penalty?" Those jurors answering no to both questions were deemed suitable, without further questioning, with respect to their attitude toward the death penalty. Those answering yes to either question were questioned further by the court.

3. Code § 8.01-358 provides: "The court and counsel for either party may examine under oath any person who is called as a juror therein and may ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case."

"A juror, knowing anything relative to a fact in issue, shall disclose the same in open court."

4. Supreme Court Rule 3A:20(a) provides that following mandatory questioning by the court as to seven potential grounds for juror exclusion, "the court, or counsel with permission of the court, may examine on oath any prospective juror or may ask any question relevant to his qualifications as an impartial juror."

5. Code of 1887 § 3154 provided, insofar as is pertinent, that "[t]he court shall, on motion of either party in any suit, examine on oath any person who is called as a juror therein, to ascertain" the juror's qualifications.

6. Code of 1919 § 6000 provided, insofar as is pertinent, that "[t]he court shall, on motion of either party in any suit, or may of its own accord," examine any prospective juror.

Acts 1966, c. 496, at 676 (language added in 1966 italicized). On June 15, 1971, this court promulgated a comprehensive set of rules governing criminal practice and procedure, to be effective January 1, 1972. One of these rules was Rule 3A:20, which unambiguously gives the trial court discretion in determining whether to allow counsel-conducted voir dire. 211 Va. cvi (1971). Code § 8-199 was recodified as Code § 8-208.28 in 1973 without any change. Acts 1973, c. 439, at 651-52. In another recodification, the texts of Code §§ 8-215 (1957 Repl.Vol.)[7] and 8-208.28 were combined to form the present text of Code § 8.01-358. Acts 1977, c. 617, at 1111.

As both parties recognize, we have not previously resolved whether the 1966 amendment to this statute confers upon attorneys an unconditional right to participate directly in voir dire. In *Harmon v. Commonwealth*, 209 Va. 574, 166 S.E.2d 232 (1969), we held that when a litigant's attorney has agreed that the judge alone would ask the voir dire questions, he or she cannot require the trial judge to exercise that right in a particular fashion. In upholding Harmon's conviction, we concluded that the statutory *permission* for the court to ask such questions directly does not *require* a court to do so. Thus, the trial court was permitted, but not required as contended by Harmon, to question jurors individually. In regard to voir dire conducted by counsel, we noted that the propounding of questions by the trial judge, and not by counsel for the defendant, was "in accordance with the usual practice." 209 Va. at 579, 166 S.E.2d at 236. We also concluded that the word "may" "is not mandatory but permissive and leaves the matter to the discretion of the trial court." 209 Va. at 580, 166 S.E.2d at 236.

Prior to the 1966 amendment, the litigants' counsel had no authority whatsoever for directly participating in voir dire examinations. "Although the statute formerly required the judge alone to ask the questions, in practice most trial courts *permitted* counsel to ask them directly." Boyd, *Practice and Pleading: The Twelfth Annual Survey of Virginia Law: 1966-1967*, 53 Va.L.Rev. 1763, 1781 (1967) (emphasis added). The 1966 amendment "sanction[ed] this deviation and [brought] Virginia in line with the procedure in other jurisdictions." *Id.* Thus, the amendment authorized what was already in fact occurring: counsel's participation in voir dire when permitted by the trial court.

Cognizant that the statutory language might be subject to different interpretations, this court in 1971 promulgated Rule 3A:20(a) of the Rules of Criminal Practice and Procedure. This Rule, which clearly makes counsel's participation in voir dire contingent upon the trial court's approval, resolved any ambiguity present in the statutory language.

[2, 3] Turner suggests that, even if Code § 8.01-358 confers no unconditional right to counsel-conducted voir dire, the trial court abused its discretion in refusing to allow defense counsel to question prospective jurors directly and in not questioning each prospective juror out of the presence of other jurors. While the defendant has a constitutional right to a fair and impartial jury, he has no constitutional right to counsel-conducted voir dire. *See, e. g., United States v. Duke*, 409 F.2d 669, 671 (4th Cir. 1969), *cert. denied*, 397 U.S. 1062, 90 S.Ct. 1497, 25 L.Ed.2d 683 (1970). In the absence of a statute or court rule to the contrary, as long as the selection procedure results in a fair and impartial jury, the manner in which a jury is to be selected is properly within the trial court's sound discretion. Thus, the trial court's refusal to question jurors individually out of the presence of other prospective jurors and the court's refusal to allow counsel-conducted voir dire do not represent an abuse of discretion. *See Dean v. Commonwealth*, 209 Va. 666, 669, 166 S.E.2d 228, 230 (1969). We have carefully examined the voir dire conducted

7. Code § 8-215 (1957 Repl.Vol.) provided: "A juror, knowing anything relative to a fact in issue, shall disclose the same in open court."

by the trial judge and believe it resulted in a fair and impartial jury. Under such circumstances, we cannot say the trial judge abused his discretion.

B. REFUSAL TO ASK SPECIFIC QUESTIONS PROPOSED BY DEFENSE COUNSEL

[4] As noted previously, the trial court refused to ask several questions proposed by defense counsel.[8] Turner contends that the failure to ask these questions constituted prejudicial error.

The pre-1966 text of what is now Code § 8.01-358 provided that "[t]he court shall, on motion of either party in any suit, examine" jurors to ascertain their qualifications concerning impartiality and lack of bias. The 1966 amendment deleted this requirement, providing merely that "the court . . . may examine [a prospective juror] and may ask [such juror] any relevant question." In *Harmon v. Commonwealth*, 209 Va. at 580, 166 S.E.2d at 236, we held that this statutory language "is not mandatory but permissive and leaves the matter to the discretion of the trial court." With the exception of seven questions, all of which were asked in this case, Rule 3A:20(a) makes voir dire questioning entirely discretionary with the trial court. Unless the refusal to ask a question amounts to a denial of due process or otherwise impinges upon the right to a fair and impartial jury, *see, e. g., Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973), the present wording of Code § 8.01-358 and Rule 3A:20(a) empowers a trial court to use its discretion in determining whether to ask questions proposed by either the Commonwealth or the defendant.

[5-7] The trial court's refusal to ask the questions proposed by defense counsel did not impinge upon the defendant's right to a fair and impartial jury. While "the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant," a trial court's refusal to do so is not constitutionally objectionable in the absence of factors similar to those in *Ham*.[9] *Ristaino v. Ross*, 424 U.S. 589, 597 n.9, 96 S.Ct. 1017, 1022 n.9, 47 L.Ed.2d 258 (1976). The mere fact that a defendant is black and that a victim is white does not constitutionally mandate such an inquiry. *Lewis v. Commonwealth*, 218 Va. 31, 35-36, 235 S.E.2d 320, 323 (1977). The refusal of the trial court to ask other questions, those concerning the circumstances under which a prospective juror would vote for the death penalty, likewise is not constitutionally objectionable. The voir dire questioning conducted by the trial judge probed many of the areas touched upon by these questions and assured the removal of those who would invariably im-

5. Of the fifteen questions submitted by defense counsel, one question was withdrawn, nine were asked by the trial judge, and five were refused. These five questions were:

"(10) The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?

(11) Do you feel that if a person is to be given the death penalty for the unlawful killing of another person, such penalty should be given only if such killing is of the most severe and aggravated nature?

(13) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty?

(14) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if there is a probability that the person would commit criminal acts of violence that would constitute a continuing threat to society?

(15) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder?"

9. Turner introduced a study indicating that black defendants killing white victims "receive the death penalty more frequently than black defendants killing blacks, whites killing blacks, or whites killing whites. The study, however, was based upon statistics compiled in other states and thus was of little utility in establishing the potential of prejudice in Virginia.

pose capital punishment. The court's instructions to the jury clearly delineated the circumstances in which the death penalty could be imposed. Since the questioning actually conducted by the court preserved the defendant's right to a fair and impartial jury, the trial court's refusal to ask the voir dire questions proposed by defense counsel was not an abuse of discretion.

C. EXAMINATION OF PROSPECTIVE JURORS CONCERNING ATTITUDES ABOUT CAPITAL PUNISHMENT

[8] For the reasons stated in *Wayne v. Commonwealth*, 219 Va. 683, 690-91, 251 S.E.2d 202, 207, *cert. denied*, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979), we reject Turner's contention that the trial court should not have questioned prospective jurors concerning their willingness to impose capital punishment.

[9-11] We likewise believe that the trial court properly struck Samuel Cypress from the venire. After asking Cypress variations of the questions asked of others on the panel,[10] the trial judge concluded that Cypress' objections to capital punishment were absolute. While jurors may not be excluded "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776 (1968), those jurors irrevocably committed to voting against the death penalty may be excluded. *Coppola v. Commonwealth*, 220 Va. 243, 250, 257 S.E.2d 797, 802 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980); *Smith v. Commonwealth*, 219 Va. 455, 464, 248 S.E.2d 135, 141 (1978), cert. denied, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979). The trial court's determination that a juror is irrevocably committed to voting against the death penalty will not be disturbed on appeal unless we can say the prospective juror's commitment against the death penalty was not "unmistakably clear." *Smith v. Commonwealth*, 219 Va. at 465, 248 S.E.2d at 141. *Accord, Coppola v. Commonwealth*, 220 Va. at 250, 257 S.E.2d at 802. On the basis of the answers given by Cypress, the trial court reasonably concluded he was irrevocably committed against the death penalty.

D. SEQUESTRATION OF THE JURY

Turner sought and obtained a change of venue from Southampton County to Northampton County. Upon learning of a recent Northampton County case involving the death penalty and another murder in the area, defense counsel moved for another change in venue and for sequestration of the jury, both of which were denied. Turner contends that the refusal to sequester the jury was prejudicial error.

[12-14] As Turner's counsel notes, a judge has discretion in determining whether to sequester a jury. The mere fact of media coverage does not require a judge to sequester a jury. *Thompson v. Commonwealth*, 219 Va. 498, 247 S.E.2d 707 (1978). A trial judge's discretion regarding sequestration extends to cases involving capital punishment. We hold that, in the absence of any indication of pretrial prejudicial publicity, a trial judge has wide discretion in deciding whether to sequester a jury.

10. The complete examination of Cypress appears below:

"THE COURT: Now, Mr. Cypress, do you have any religious or conscientious scruples or objections against the imposition of the death penalty?

MR. CYPRESS: Well, really, I don't go for the death penalty.

THE COURT: Can you say yes or no to that question?

MR. CYPRESS: No.

THE COURT: Or yes?

MR. CYPRESS: Do I have any objection?

THE COURT: Yes.

MR. CYPRESS: Yes.

THE COURT: Is your objection to the death penalty absolute?

MR. CYPRESS: Well, I would say yes.

THE COURT: Could you in a proper case impose the death penalty?

MR. CYPRESS: Didn't hear.

THE COURT: Could you in a proper case impose the death penalty?

MR. CYPRESS: Well, I can't see where it helps any."

III. CONSTITUTIONALITY OF THE DEATH PENALTY PROVISIONS

A. FACIAL CONSTITUTIONALITY

[15] Turner contends that Virginia's statutory provisions concerning the death penalty are facially unconstitutional for reasons previously rejected by us. *See Martin v. Commonwealth*, 221 Va. 436, 440, 271 S.E.2d 123, 126 (1980); *Mason v. Commonwealth*, 219 Va. 1091, 1094–95, 254 S.E.2d 116, 118–19 (1979); *Waye v. Commonwealth*, 219 Va. 683, 698–99, 251 S.E.2d 202, 211 (1979); and *Smith v. Commonwealth*, 219 Va. 455, 476–79, 248 S.E.2d 135, 148–49 (1978). We reaffirm these prior holdings concerning the facial constitutionality of the death penalty statutory provisions.

[16] Turner also argues that the imposition of the death penalty on the basis of a jury's conclusion regarding a defendant's propensity for future crime is unconstitutional.[11] The statutory objective of isolating a criminal, according to Turner, can be accomplished through the less drastic measure of life imprisonment. As Turner acknowledges, *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), upheld as constitutional a Texas statute allowing the imposition of the death penalty where a jury determines, *inter alia*, the defendant would probably commit "criminal acts of violence that would constitute a continuing threat to society." 428 U.S. at 269, 96 S.Ct. at 2955. While the only issue explicitly addressed concerning a defendant's propensity for future criminal conduct was whether the jury was being asked to resolve a question beyond its competency, 428 U.S. at 274–76, 96 S.Ct. at 2955–2958, we believe *Jurek* holds that a defendant's propensity for future criminal acts of violence is an acceptable consideration in determining whether to impose the death penalty. *See also Gregg v. Georgia*, 428 U.S. 153, 183 n.28, 96 S.Ct. 2909, 2930 n.28, 49 L.Ed.2d 859 (1976) (plurality opinion).

11. Turner does not contend that the jury had no basis for concluding he would probably commit "criminal acts of violence that would constitute a continuing serious threat to society." Code § 19.2-264.2. Since 1974, the defendant has been convicted of malicious maiming, escape, unlawful wounding, malicious wounding, and second degree murder. Four of these offenses occurred in the penal system.

B. CONSTITUTIONALITY AS APPLIED

[17] Citing *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), Turner contends there was insufficient evidence to support a conclusion that his conduct in committing the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery." Code § 19.2-264.2. As we noted in *(James Dyrall) Briley v. Commonwealth*, — Va. —, 273 S.E.2d 57 (1980), *Godfrey* rested upon its unique facts. The *Godfrey* prosecutor conceded the defendant had not tortured the victims or committed an aggravated battery upon them. 100 S.Ct. at 1763. Godfrey had no prior criminal record. Thus, the death sentence rested upon the jury's finding that Godfrey's actions had been "outrageously or wantonly vile, horrible or inhuman in that [they] involved ... depravity of mind." 100 S.Ct. at 1767. Rejecting such a conclusion as unconstitutional, the Supreme Court of the United States noted several facts: Godfrey's victims, family members who had caused him "extreme emotional trauma," were killed instantaneously; and shortly after the killings Godfrey acknowledged his involvement and the heinous nature of his crimes. *Id.* Godfrey's crimes were not deemed to reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." *Id.* In summary, the state had not proven "a principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.*

The second clause of Code § 19.2-264.2 (hereafter, the "vileness" clause) provides specific criteria which must be met before the death penalty can be imposed on the basis of this clause. The conduct in committing the offense must be deemed to be "outrageously or wantonly vile, horrible or

inhuman." Code § 19.2-264.2. Second, the jury must conclude that the conduct establishes one of the following: torture of the victim, an aggravated battery of the victim, or the perpetrator's depravity of mind. *See Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980).

In the present case, the Commonwealth established that Turner's conduct was "outrageously or wantonly vile, horrible or inhuman." Turner first shot Smith in the head without warning. After Smith slumped behind the counter, Bain immediately pleaded with Turner not to fire any more. After the defendant had fired one bullet hitting the rear wall and another one hitting Smith's head, Cosby became nauseous and asked if she could be seated. Rejecting Bain's pleas, Turner then leaned over the counter and fired two bullets into Smith's chest. While Smith was slumped behind the counter, Cosby heard him "gurgling." The evidence also establishes Turner committed an "aggravated battery," a "battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978). After being wounded by Turner, Smith slumped helplessly behind the counter. Unlike Godfrey's victims, Smith did not die instantaneously from a single discharge of a firearm.

[18, 19] Virginia's death penalty statute authorizes the imposition of the death penalty if either the "dangerousness" or "vileness" standard is met. Even if Turner's crime did not meet the "vileness" standard, imposition of the death penalty would be permissible under the "dangerousness" standard.[12] On the basis of Turner's prior criminal record, set forth in footnote 11, the jury could reasonably conclude that the defendant would probably "commit criminal acts of violence that would constitute a continuing serious threat to society." Code § 19.2-264.2.

IV. REFUSAL TO INSTRUCT THE JURY CONCERNING MURDER IN THE COMMISSION OF AN ATTEMPTED ROBBERY

Code § 18.2-31(d), as noted earlier, provides that murder "in the commission of robbery" while armed with a deadly weapon is capital murder. Code § 18.2-32 provides that murder "in the commission of, or attempt to commit," robbery is first-degree murder. Whereas Code § 18.2-32 is violated by a murder in an attempted robbery, Code § 18.2-31(d) is not. To be convicted under Code § 18.2-31(d), the defendant must have committed a robbery.

[20] Turner contends that the jury should have been instructed concerning the lesser offense of first-degree murder because the evidence failed to establish the commission of a robbery. While Turner never had physical possession of the jewelry bags personally, we believe the requirement of asportation has been satisfied in this case. "The degree of asportation necessary to constitute a taking under the common law definition of robbery need be only slight." *Durham v. Commonwealth*, 214 Va. 166, 168, 198 S.E.2d 603, 606 (1973). A perpetrator exercises dominion and control over an object where he commands another to seize the object and the person complies. In this case, Turner at gunpoint commanded Smith and Cosby to place money and valuables into jewelry bags owned by the store. Placing the money and valuables into the bags as requested, Smith and Cosby then put the bags on the counter. Turner exercised dominion and control over the money and valuables when Smith and Cosby asported these items at his command.

12. As in *(James Dyrall) Briley v. Commonwealth*, Va. , 273 S.E.2d 57 (this day decided), the jury returned a sentencing verdict without striking out the inapplicable language ("and" or "or"). Unlike in *Briley*, however, the trial judge in Turner's case refused to ask the jury members, either individually or collectively, whether their sentencing verdict was grounded upon the "dangerousness" or "vileness" standard or both. While the trial judge's refusal was not prejudicial error, it would accord with better practice to determine with certainty the basis for the jury's sentence. Such a procedure would greatly facilitate the process of appellate review.

V. DOUBLE JEOPARDY

Citing *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980), Turner contends that the Double Jeopardy Clause of the United States Constitution [13] was violated when he was convicted of the use of a firearm in the commission of a felony, Code § 18.2-53.1,[14] as well as murder in the commission of a robbery "while armed with a deadly weapon," Code § 18.2-31(d). In *Busic*, the Supreme Court held that 18 U.S.C. § 924(c), providing enhanced punishment for one using or carrying a firearm [15] in the commission of a felony, could not be applied to a defendant using a firearm in the course of a felony that is proscribed by a statute which itself authorizes enhancement if a deadly weapon is used. Both *Busic* and its precursor, *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978), were based upon a determination of Congressional intent.

[21] The constitutional prohibition of double jeopardy consists of three separate guarantees. (1) "It protects against a second prosecution for the same offense after acquittal. [(2)] It protects against a second prosecution for the same offense after conviction. [(3)] And it protects against multiple punishments for the same offense." *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 2264, 65 L.Ed.2d 222 (1980) quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). In determining whether a defendant has been twice convicted for the "same offense," U.S.Const., amend. V, courts have been guided by the test set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932): "[T]he test to be applied to determine whether there are two offenses or only one, is whether each [statutory] provision requires proof of a fact which the other does not."

[22, 23] We need not resolve whether one convicted of the use of a firearm in the commission of a felony (Code § 18.2-53.1) and murder in the commission of a robbery while armed with a deadly weapon [Code § 18.2-31(d)] has been convicted twice for the "same offense" under the *Blockburger* test.[16] As noted earlier, the defendant's convictions stem from a single criminal trial. Consequently, only the third constitutional guarantee (the guarantee against

13. U.S.Const., amend. V, provides that no one in a criminal case "shall ... be subject for the same offense to be twice put in jeopardy of life or limb."

14. Code § 18.2-53.1 provides that: "It shall be unlawful for any person to use or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit murder, rape, robbery, burglary, malicious wounding as defined in § 18.2-51, or abduction. Violation of this section shall constitute a separate and distinct felony and any person found guilty thereof shall be sentenced to a term of imprisonment of one year for a first conviction and for a term of three years for a second or subsequent conviction under the provisions of this section. Notwithstanding any other provision of law, the sentence prescribed for a violation of the provisions of this section shall not be suspended in whole or in part, nor shall anyone convicted hereunder be placed on probation. Such punishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony."

15. Firearm, as defined in 18 U.S.C. § 921, includes a number of destructive devices not generally deemed to be firearms. *See Simpson v. United States*, 435 U.S. at 10, n.4, 98 S.Ct. at 911, n.4.

16. The statutory provisions at issue in this case are similar to those at issue in *Wayne County Prosecutor v. Recorder's Court Judge*, 406 Mich. 374, 280 N.W.2d 793, *appeal dismissed for want of a substantial federal question sub nom. Brantley v. Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979) (use of a firearm in the commission of a felony and robbery "while armed with a dangerous weapon"). Under *Hicks v. Miranda*, 422 U.S. 332, 343-45, 95 S.Ct. 2281, 2288-2290, 45 L.Ed.2d 223 (1975), the Supreme Court's dismissals for want of a substantial federal question are dispositive precedent for those issues presented in a petitioner's appeal. In light of our conclusion concerning the significance of legislative intent on the issue before us, it is unnecessary to determine whether the Supreme Court's dismissal for want of a substantial federal question adjudicated whether felony-firearm and robbery "while armed with a dangerous weapon" constituted the same offense under *Blockburger*.

multiple punishments) is at issue in this appeal. The constitutional guarantee against multiple punishments "is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977). Where two or more punishments for separate statutory violations are imposed in a single criminal proceeding, "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to impose." *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 1441, 63 L.Ed.2d 715 (1980) (Blackmun, J., concurring).

[24] The General Assembly has clearly indicated its intent to impose multiple punishments for capital murder and use of a firearm in the commission of a felony. Code § 18.2-53.1 provides that a "[v]iolation of this section shall constitute a separate and distinct felony" and that the punishment imposed for violating Code § 18.2-53.1 "shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony." This language reflects an unambiguous intent to authorize multiple punishment for a single criminal transaction. Thus, Turner's double jeopardy claim has no merit.

VI. REVIEW REQUIRED BY CODE § 17-110.1

[25] Code § 17-110.1(C)(1) requires that we consider and determine whether the death sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor." We have carefully considered the record in this case and find no indication that the death sentence was the product of these enumerated factors.

[26] Code § 17-110.1(C)(2) requires us, after "considering both the crime and the defendant," to determine whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases." We have reviewed death sentences in those cases involving murder in the commission of a robbery while armed with a deadly weapon. *(James Dyral) Briley v. Commonwealth*, — Va. —, 273 S.E.2d 57 (1980); *(Linwood) Briley v. Commonwealth*, — Va. —, 273 S.E.2d 48 (1980); *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980); *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980). While the atrociousness involved in Turner's murder does not rise to the level evidenced in *Stamper*, *(James Dyral) Briley*, or *Coppola*, Turner's murder is just as brutal as the murders in *(Linwood) Briley* and *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied*, 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980). Moreover, the defendant's criminal record, detailed in footnote 11, is one of the most extensive we have reviewed under Code § 17-110.1(C). Turner, unlike any of the other defendants except for Mason,[17] had been convicted for a previous murder. Certainly his prior criminal record is as extensive or more extensive than the criminal records of those other defendants sentenced to death for murder in the commission of an armed robbery. Having considered "both the crime and the defendant," Code § 17-110.1(C)(2), we conclude the death sentence is not excessive or disproportionate to the sentences imposed in similar cases.

VII. OTHER ASSIGNMENTS OF ERROR

[27-29] For the reasons stated in *(James Dyral) Briley v. Commonwealth*, *supra*, and *(Linwood) Briley v. Commonwealth*, *supra*, we reject Turner's contention that a further change in venue was necessary. We like-

17. *Mason v. Commonwealth*, 219 Va. 1091, 254 S.E.2d 116, *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

wise reject his argument that photographs of the victim and crime scene should not have been introduced into evidence. *Waye v. Commonwealth*, 219 Va. at 692, 251 S.E.2d at 207-08. Moreover, Turner's contention that the jury should have been given an instruction concerning the possibility of parole has no merit. *Stamper v. Commonwealth*, 220 Va. at 278, 257 S.E.2d at 821; *Clark v. Commonwealth*, 220 Va. at 214, 257 S.E.2d at 792.

Turner raises several other assignments of error, discussed neither in his brief nor in oral argument. After examining each of these assigned errors, we conclude that they have no merit and require no further discussion.

Having given the defendant's case both appellate and independent review, we conclude there is no reversible error in either his convictions or sentences, and we find no other reason to disturb or commute his death sentence. Therefore, we affirm the judgments pronounced by the trial court.

Affirmed.

Linwood Earl BRILEY

v.

COMMONWEALTH of Virginia.

Record No. 800690.

Supreme Court of Virginia.

Nov. 26, 1980.

The Circuit Court, City of Richmond, William E. Spain, J., convicted defendant of capital murder for willful, deliberate, and premeditated killing occurring in the commission of a robbery while armed with a deadly weapon, and defendant appealed. The Supreme Court, Carrico, J., held that: (1) trial court did not err in denying motion for change of venue; (2) trial court did not err in ruling that if defense counsel examined prosecution witness concerning other crimes involved in plea bargain, Commonwealth would be permitted to question witness with respect to defendant's participation in the same offenses; (3) trial court did not err in taking the position that jury would be permitted only either to find defendant guilty of capital murder or to acquit him; (4) trial court's instruction sufficiently informed jury of its option to fix punishment at life imprisonment even if jury also found existence of aggravating circumstances permitting recommendation of death penalty; and (5) imposition of death penalty was neither excessive nor disproportionate.

Affirmed.

1. Criminal Law ⇐121

In murder prosecution, trial court did not abuse its discretion in denying motion for change of venue.

2. Jury ⇐103(1)

Prospective jurors who had read accounts or listened to broadcasts concerning criminal activities of defendant but who had not formed opinion concerning defendant's guilt and who stated unequivocally that they would determine case solely upon coverage presented in court, were not disqualified from service on defendant's jury.

3. Criminal Law ⇐126(1)

Claim that sheer volume of media coverage required change in location of trial, was not, standing alone, sufficient to require change of venue.

4. Criminal Law ⇐396(1)

Where chief prosecution witness stated that, in return for his truthful testimony, Commonwealth had promised he would "get no more time than anyone else in this case," where plea agreement encompassed other cases in which witness was charged along with defendant and his brothers, and where defense counsel proposed to inquire fully into plea agreement and other crimes, trial court did not err in ruling that if defense

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

FILED

MAY 23 1984

CLERK, U.S. DISTRICT COURT
NORFOLK, VIRGINIA

WILLIE LLOYD TURNER, #95190,

Petitioner

v.

GARY BASS, SUPERINTENDENT, ET AL.,

Respondents

CIVIL ACTION
NO. 83-501-N

MEMORANDUM ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner is a prisoner in the Virginia penal system.

Petitioner is being detained pursuant to a judgment of the Circuit Court of Southampton County, Virginia of February 19, 1980, wherein petitioner was convicted of capital murder, use of a firearm in the commission of murder, and possession of a sawed off shotgun in the commission of robbery. He was sentenced to respective sentences of death, one year in the penitentiary, and a life term in the penitentiary. The death sentence was imposed in a separate hearing from the trial on guilt or innocence as is required in Va. Code §§ 19.2-264.3 and 19.2-264.4 (1950). These convictions arose out of events occurring on July 12, 1978, during which petitioner shot and killed the proprietor of a jewelry store in Franklin, Virginia.

Petitioner appealed his convictions to the Supreme Court of Virginia. On November 26, 1980, that Court issued a written opinion in which it affirmed petitioner's conviction in all respects.

(f) Petitioner argues that execution by means of electrocution constitutes cruel and unusual punishment. This argument is contrary to the decision of the Supreme Court and is thus without merit. In Re Kemmler, 136 U.S. 436 (1890); Gregg v. Georgia, 428 U.S. at 170, 178; See also Gray v. Lucas, 710 F.2d 1048, 1060 (5th Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 211 (1983).

Voir Dire

Petitioner has alleged that the voir dire conducted at his trial was flawed in several respects.

The trial judge conducted the voir dire, using certain of the questions which counsel for both sides had submitted to him. The prospective jurors were called forward in groups of five while the remainder were excluded from the courtroom. Those five were first asked, as a group, to respond to several questions. Each prospective juror was then asked individually as to his or her feelings concerning the death penalty. These responses were elicited for the purpose of "death-qualifying" the jury, a process approved in Witherspoon v. Illinois, 391 U.S. 510 (1968); Adams v. Texas, 448 U.S. 38 (1980). The Supreme Court in Witherspoon held that those prospective jurors who express an absolute opposition to the death penalty may be excluded from service as jurors in a capital murder case. The trial court struck for cause three jurors who expressed an absolute opposition to the imposition of the death penalty. (The trial court also struck several prospective jurors who stated that

they believed that the death penalty was the appropriate punishment for anyone convicted of murder.)

The petitioner argues that there was error both in the type of questions asked and in the manner in which the voir dire was conducted. Each complaint will be deal with below.

(a) Petitioner's first assignment of error involves the death qualification of the jury as authorized in Witherspoon. Petitioner argues that the death qualification process yields a venire which does not represent a cross-section of the community and a jury which is conviction-prone. Petitioner has offered to produce data which, he contends, will establish the truth of his assertions. Whil the arguments which petitioner made at the earlier proceedings were less fully developed than they now appear to be, this Court will consider petitioner's present arguments in their entirety.

The Fourth Circuit has spoken twice on this issue. First, one of the petitioner's claims in Barfield v. Harris, 719 F.2d 58 (4th Cir. 1983) was identical to the argument now made by petitioner in the case at bar. In Barfield, the Fourth Circuit affirmed the distfict court's decision to deny relief to Barfield on this claim. Barfield v. Harris, 540 F.Supp. 451, 464 (E.D.N.C. 1982). Second, the petitioner in Hutchins v. Woodard, et al., No. 84-8050, slip op. (4th Cir. March 13, 1984) sought a certificate of probable cause to appeal and a stay of execution on the same ground that Turner pursues here. The Fourth Circuit declined to grant the certificate and the stay. In the lead opinion, Judge Murnaghan wrote, inter alia, that Hutchins did not have a decided or substantial chance of prevailing on the merits of this issue. See, Barefoot v. Estelle,

___ U.S. ___, 103 S.Ct. 3383 (1984). It appears to this Court that Judge Phillips may have reached a similar conclusion. It is important to note that the decision in Hutchins followed the issuance of the opinion in Keeten, et al. v. Garrison, 578 F.Supp. 1164 (W.D. N.C. 1984) in which Judge McMillan found merit in the same argument which petitioner now makes to this Court. Although the Fourth Circuit made quite clear its desire that Hutchins was not to be considered res judicata or stare decisis on this issue, this Court reads the opinions of Judges Murnaghan and Phillips as indicating their belief that the view expressed in Keeten will probably not prevail in this Circuit.

Moreover, a significant number of courts which have treated this issue have disagreed with the position taken by petitioner, e.g., Corn v. Zant, 708 F.2d 549 (11th Cir. 1983); Smith v. Balkcom, 660 F.2d 573; Spinkellink v. Wainwright, 578 F.2d 582. While it is true that two district courts recently have found merit in petitioner's claim, Keeten, 578 F. Supp. 1164; Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), this Court is impressed with the reasoning of those cases which reject petitioner's arguments. Indeed, the decisions of these courts establish that, even assuming the validity of the social science data which petitioner would proffer to substantiate his claim, see, Keeten, 578 F.Supp. 1164; Grigsby, 569 F.Supp. 1273, petitioner's argument must fail. Accordingly, the Court adopts the reasoning in Spinkellink, 578 F.2d at 591-99, and concludes that petitioner is not entitled to relief as to this claim. See also, Barfield, 540 F.Supp. at 464. In addition, this Court concludes that an evidentiary hearing on this claim is not warranted. See, Townsend v. Sain, 372 U.S. 293 (1963).

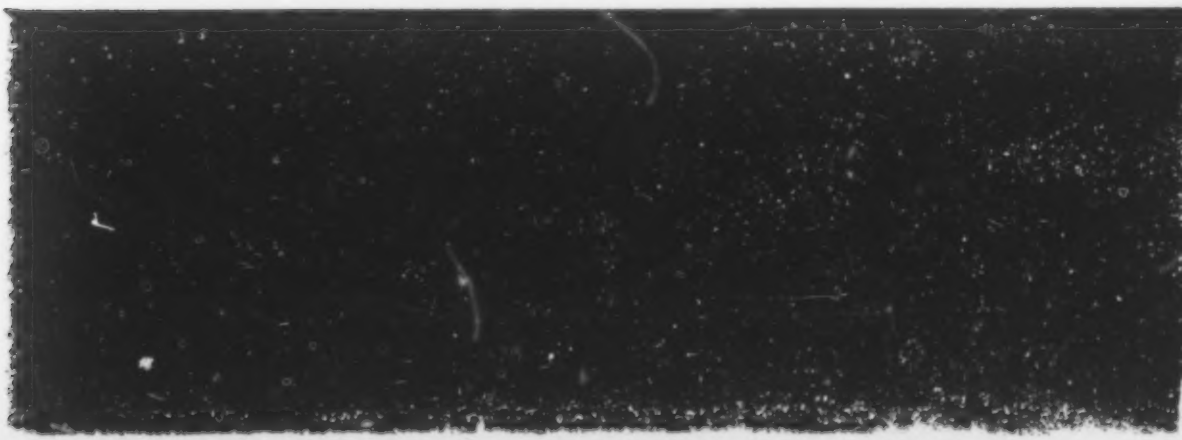
(b) As discussed above, the trial judge questioned the prospective jurors individually in order to ascertain if any one should be excluded on Witherspoon grounds. Petitioner has argued that Samuel Cypress was improperly struck from the jury because, according to petitioner, Cypress did not expresss an unequivocal opposition to the death penalty. However, the Court finds petitioner's argument to be without merit.

According to the principles announced in Witherspoon, a juror may not be excluded merely because he or she objects to the death penalty. Witherspoon provides for the exclusion of those prospective jurors,

> . . . who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them . . .

Id. at 522-23, n. 21 (emphasis in original); Adams v. Texas, 448 U.S. 38.

At the conclusion of Cypress' individual voir dire, the trial court granted the Commonwealth's motion and excused Cypress for cause. Tr. at 91 (December 3, 1979). While the rule in Witherspoon and Adams is clear, there is no magic formula by which a trial judge can determine who is properly excludible. Therefore, it becomes important for the trial judge to gauge a prospective juror's demeanor and manner of responding to the questions. As a result, trial judges are generally given a great deal of discretion in evaluating juror impartiality. Darden v. Wainwright, 699 F.2d 1031 (11th Cir. 1983). Moreover, this Court must defer to the factual finding made by the state court on this issue. 28 U.S.C. § 2254(d); Sumner v. Mata, 449 U.S. 539 (1981).



This Court is satisfied that the trial judge acted properly in excusing Cypress from service on the jury. Throughout the voir dire, the judge demonstrated a familiarity with the principles embodied in Witherspoon and Adams. In questioning Cypress, the trial judge carefully followed up Cypress' initial, and somewhat equivocal, response. The judge received answers which he felt required that Cypress be removed for cause. In sum, this Court refuses to accede to petitioner's request that we second guess the finding of the trial judge on this matter.

(c) Petitioner has complained that his counsel was denied the opportunity to conduct voir dire, in violation of petitioner's Sixth and Fourteenth Amendment rights. At trial, petitioner's counsel timely requested that they be permitted to conduct, in whole or in part, the voir dire of the prospective jurors. The trial judge denied counsel's motion and conducted the entire voir dire himself.

On direct appeal, the Supreme Court of Virginia settled any question as to the trial court's authority to conduct the voir dire under Va. Code § 8.01-358 and Supreme Court Rule 3A:20; Turner v. Commonwealth, 273 S.E.2d 36. Naturally, this Court defers to the interpretation of Virginia law provided by the Virginia Supreme Court. Wicker v. National Surety Corporation, 330 F.2d 1009, 1012 (4th Cir. 1964), cert. denied, 379 U.S. 838 (1964).

Petitioner contends, however, that this procedure deprived him of his constitutional right to a fair trial. In United States v. Duke, 409 F.2d 669 (4th Cir. 1969), cert. denied, 397 U.S. 1062 (1970), the Fourth Circuit held that Rule 24 of the Federal Rules of Criminal Procedure is constitutional, including that aspect of

the Rule which permits the trial court to conduct the voir dire. The Court concluded that there were substantial reasons for permitting the trial court to conduct voir dire. These reasons are even more compelling in the Witherspoon context where the trial judge must decide whether a prospective juror is unequivocally opposed to the death penalty. In such a situation, where a person's conscience and moral beliefs must be probed, it might be preferable for the judge himself, as an impartial party, to conduct the voir dire. Indeed there is the possibility that counsel for either side could, through their questions, confuse or prejudice the prospective jurors. In sum, the trial judge's decision to conduct the voir dire did not infringe any of petitioner's constitutional rights.

(d) Petitioner has also complained that the trial court deprived him of a fair trial by refusing to permit individual voir dire, to ask prospective jurors as to their racial attitudes and to probe their understanding of the presumption of innocence. Petitioner's argument fails.

The trial judge retains wide discretion in determining the way in which voir dire will be conducted. Ristaino v. Ross, 424 U.S. 589, 594 (1976); Aldridge v. United States, 283 U.S. 308 (1931). As noted above, the trial judge chose to question the jurors individually as to their feelings regarding the death penalty, although the other questions were asked of the jurors as a group. The decision as to whether, and to what extent, the prospective jurors should be questioned individually falls squarely within the ambit of the judge's discretion. This Court finds no reason, of a constitutional dimension, to upset the trial judge's decision to conduct the voir dire as he did.

This Court also will not disturb the trial court's decision not to question jurors as to their racial attitudes. The Supreme Court considered this issue in Ristaino, 424 U.S. 589. In Ristaino, the Court held that defendant was not entitled to have prospective jurors questioned about racial prejudice because the facts in that case "did not suggest a significant likelihood that racial prejudice might infect [defendant's] trial." Id. at 598. Compare, Ham v. South Carolina, 409 U.S. 524 (1973) (black defendant was civil rights activist asserting defense that he was "framed"). In Ristaino, unlike in Ham, racial issues were not "inextricably bound up with the conduct of the trial." Ristaino at 596. The Court further stated that the mere fact that the defendant was black and the victim was white did not require the trial court to inquire as to the racial attitudes of the prospective jurors. Id. at 597.

In the case at bar, petitioner has not shown that an investigation of the racial attitudes of prospective jurors was necessary as racial issues are not inextricably bound up with the facts at trial. And as in Ristaino, the fact that petitioner is black and his victim was white did not entitle petitioner to have such questions asked. (Petitioner has cited Rosales-Lopez v. United States, 451 U.S. 182 (1981) as support for his position. However, that case does not, in any way, affect the conclusion reached by this Court. The plurality opinion in Rosales-Lopez, joined in this respect by Justices Burger and Rehnquist, reiterates that the Ristaino standard is to be used to determine when the Constitution requires that the racial attitudes of prospective jurors be investigated. Id. at 189-90.)

Finally, petitioner has argued that the trial judge never inquired as to the ability of the prospective jurors to understand and apply the presumption of innocence. There is no merit to this contention. The trial judge asked all prospective jurors whether they had "formed any opinion with regard to the guilt or innocence" of the petitioner. E.g. Tr. at 47 (December 3, 1979). None of the prospective jurors indicated that they had done so. There was, therefore, no need for the trial judge to inquire further. In light of the deference to be accorded the trial judge, this Court sees no constitutional infirmity with the way the judge handled the voir dire.

(e) Finally, the petitioner has argued that he has a constitutional right to meaningful voir dire so that he may make intelligent peremptory challenges. Petitioner claims this right was infringed here. However, the Constitution does not guarantee petitioner a right to exercise peremptory challenges at all. Swain v. Alabama, 380 U.S. 202, 219 (1966); see, United States v. Rucker, 557 F.2d 1046 (4th Cir. 1977).

The trial judge gave petitioner the opportunity to exercise peremptory challenges. Petitioner has not shown that he was unable to exercise them properly. Moreover, as discussed above, the trial judge has much discretion in conducting the voir dire. This Court concludes after reviewing the record, that the voir dire did not impermissibly infringe the petitioner's exercise of the peremptory challenges he was allotted.

(f) Petitioner argues that the trial court deprived him of his right to due process when it refused to continue the trial and to sequester the jury. Petitioner contends that these measures

4,600 pounds of marijuana. This sentence was within the limits set by Congress.

After a consideration of all of the appellant's arguments, the decision of the trial court is affirmed.

AFFIRMED.

Willie Lloyd TURNER, Appellant,

v.

Gary BASS, Superintendent, Appellee.

No. 84-4004.

United States Court of Appeals, Fourth Circuit.

Argued Oct. 2, 1984.

Decided Jan. 25, 1985.

A petition was filed seeking a writ of habeas corpus. The United States District Court for the Eastern District of Virginia, John A. McKenzie, Chief Judge, denied the petition, and appeal was taken. The Court of Appeals, Widener, Circuit Judge, held that: (1) voir dire on racial prejudice was not constitutionally mandated in the petitioner's capital murder prosecution; (2) the state trial court's determination that a juror was absolutely opposed to the death penalty was supported by the evidence; (3) the petitioner's counsel's performance in handling the psychiatric defense during the sentencing phase of the trial was reasonable under prevailing professional norms, and (4) the use of the vileness criterion as it has been limited by the Virginia Supreme Court was proper.

Affirmed.

James Dickson Phillips, Circuit Judge, concurred specially with opinion.

1. Jury ⇐131(6)

Defendant's constitutional right to be tried by impartial jury does not entitle defendant to examine jurors on voir dire about every matter that may prejudice jury or against defendant. U.S.C.A. Const. Amends. 6, 14.

2. Jury ⇐131(6)

Where special circumstances exist, criminal defendant may have constitutional right to have veniremen questioned on racial prejudice. U.S.C.A. Const.Amends. 6, 14.

3. Jury ⇐131(6)

Fact that black petitioner was charged with capital murder was not in and of itself special circumstance which would give petitioner constitutional right to have veniremen questioned on racial prejudice. U.S.C.A. Const.Amends. 6, 14.

4. Jury ⇐131(6)

Fact that black petitioner was charged with capital murder of white victim was not sufficient special circumstance to give petitioner constitutional right to have veniremen questioned on racial prejudice. U.S.C.A. Const.Amends. 6, 14.

5. Jury ⇐131(6)

State court, in prosecution of black petitioner for capital murder of white victim, did not commit constitutional error in refusing to ask prospective jurors whether fact that victim was white and petitioner was black would prejudice them against petitioner or affect their ability to render fair and impartial verdict based solely on evidence. U.S.C.A. Const.Amends. 6, 14.

6. Jury ⇐108

State court's determination that prospective juror in capital murder prosecution was absolutely opposed to the death penalty in support of its decision to strike juror for cause was supported by the record.

7. Jury ⇐108

Even if Court of Appeals, in renewing denial of petition for habeas corpus, was required to make de novo review of prospective juror's qualification to serve as

jury, state trial judge could reasonably have concluded, considering juror's responses in toto, that he could not consider imposition of death penalty in the proper circumstance. 28 U.S.C.A. § 2254(d).

8. Habeas Corpus ⇐59

District court's determination that no evidentiary hearing was required on petitioner's claim that he received ineffective assistance of counsel during penalty phase of capital murder prosecution was proper. 28 U.S.C.A. § 2254(d); U.S.C.A. Const. Amend. 6.

9. Habeas Corpus ⇐59

When habeas petitioner presents facts which, if proved, would entitle him to relief, federal court can receive that evidence at hearing. 28 U.S.C.A. § 2254(d).

10. Habeas Corpus ⇐59

Evidentiary hearing on federal habeas corpus proceeding is required only if habeas petitioner establishes one or more of specified criteria. 28 U.S.C.A. § 2254(d).

11. Habeas Corpus ⇐59

No hearing is required on habeas corpus petition if facts alleged by petitioner and assumed to be true are insufficient to support a claim. 28 U.S.C.A. § 2254(d).

12. Criminal Law ⇐641.13(2)

In capital murder prosecution, petitioner's attorney's actions with respect to psychiatric testimony offered in mitigation was reasonable under prevailing professional norms and, thus, did not amount to ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

13. Homicide ⇐354

In state capital murder prosecution, ample evidence supported jury's verdict finding dangerousness criterion as aggravating factor. U.S.C.A. Const.Amends. 8, 14; Va.Code, § 19.2-264.4, subd. c.

14. Homicide ⇐354

Vileness criterion of Virginia's capital murder statute which has been construed to require not only outrageously or wantonly vile, horrible or inhuman conduct, but also that conduct involved either torture, aggravated battery of victim or perpetrator's depravity of mind, was satisfied where petitioner had been convicted previously of malicious maiming, escape, unlawful wounding, malicious wounding and second-degree murder, four offenses occurring while he was in prison. U.S.C.A. Const.Amends. 8, 14; Va.Code, § 19.2-264.4, subd. c.

15. Homicide ⇐311

In state capital murder prosecution, it was not necessary to instruct jury on each term in aggravating circumstances at sentencing stage of trial. U.S.C.A. Const. Amends. 8, 14; Va.Code, § 19.2-264.4, subd. c.

16. Criminal Law ⇐863(1)

In sentencing phase of state capital murder prosecution, petitioner was not entitled, in response to jury's request in deliberations as to what life imprisonment entailed, to instruction on subject of parole. U.S.C.A. Const.Amends. 5, 14.

J. Lloyd Snook, III, Charlottesville, Va. (Paxson, Smith, Gilliam & Scott, Charlottesville, Va., on brief), for appellant.

Robert H. Anderson, III, Asst. Atty. Gen., Richmond, Va. (Gerald L. Baliles, Atty. Gen. of Va., Richmond, Va., on brief), for appellee.

Before WIDENER, HALL and PHILLIPS, Circuit Judges.

WIDENER, Circuit Judge:

In December 1979 Willie Lloyd Turner was tried by a jury in Northampton County, Virginia and found guilty of capital murder.[1] Pursuant to Va.Code § 19.2-264.4, the jury sentenced Turner to death. Turner unsuccessfully appealed his conviction and sentence to the Virginia Supreme Court. *Turner v. Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980). The United

1. Turner was indicted in Southampton County, Virginia. A motion for a change of venue was granted and he was tried in Northampton County.

States Supreme Court denied Turner's petition for a writ of certiorari. 451 U.S. 1011, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981).

Turner then filed a petition for a writ of habeas corpus in the circuit court of Southampton County, Virginia. That petition was denied. The Virginia Supreme Court affirmed that denial. The United States Supreme Court once again denied Turner's petition for a writ of certiorari. — U.S. —, 103 S.Ct. 2465, 77 L.Ed.2d 1341 (1983).

Turner next sought relief in the federal courts. On July 27, 1983, he filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, raising numerous constitutional issues.[2] That petition was amended on March 20, 1984. The petition was initially denied on May 23, 1984, and a motion to alter or amend that judgment was denied July 19, 1984. The district court issued a certificate of probable cause, thus allowing Turner to appeal the denial of habeas corpus relief. This denial serves as the basis of the present appeal.[3] We affirm.

A brief summary of the facts leading to Turner's conviction are necessary for an understanding of the issues presented. On July 12, 1978, Turner entered Smith Jewelers in Franklin, Virginia, armed with a sawed-off shotgun, and demanded that the store owner W. Jack Smith give him money and jewelry. A store employee and a customer were also present in the store at the time. Another customer entered during the robbery. Smith set off the store's silent alarm, and momentarily police officer A.D. Bain arrived on the scene and inquired about the activation of the alarm. Bain's pistol was taken by Turner. Turner then told Smith to turn the alarm off [illegible] keep filling bags with jewelry.

Turner soon became concerned that [illegible] police officers would respond to the alar[illegible] He then fired a pistol shot into the back [illegible] the store. Officer Bain tried to ass[illegible] Turner that no other policemen would [illegible] answering the alarm. Without any war[illegible] ing and with no provocation, Turner [illegible] shot store owner, Smith, in the head. [illegible] shot in the head did not kill Smith. [illegible] passed through his scalp, but appar[illegible] not through the skull. It caused bleed[illegible] on the coverings of the brain and brui[illegible] the brain's surface. Smith slumped [illegible] then fell helplessly to the floor. Offic[illegible] Bain pleaded with Turner not to shoot [illegible] one else, and offered to take Turner [illegible] where that he wanted to go. Turner t[illegible] stated that he was "going to kill [illegible] [Smith] for snitching on [him]." He t[illegible] shot Smith, who was then still living, [illegible] less and "gurgling," twice in the che[illegible] One of these shots was in the lungs, one [illegible] the heart. Officer Bain was then able [illegible] disarm and subdue Turner. Smith died [illegible] the wounds in his chest.

I

We turn now to the several issues r[illegible] on appeal. First, Turner contends that [illegible] district court erred in upholding the t[illegible] court's refusal to permit examination of [illegible] jury on voir dire concerning racial pr[illegible] dice. He contends that because he is b[illegible] and the murder victim was white the t[illegible] court should have questioned jurors a[illegible] the existence of racial prejudice, and [illegible] his constitutional rights to a fair trial w[illegible] violated by the court's refusal.[4]

[1, 2] A criminal defendant such as [illegible] defendant here has a constitutional r[illegible]

2. Turner has exhausted his state remedies as required by *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

3. Turner's execution date was set for September 19, 1984. On August 28, 1984, this court entered a stay pending further order of this court.

4. Turner's counsel requested that the jurors be asked the following:

> The defendant, Willie Lloyd Turner, is a [illegible] ber of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will [illegible] facts prejudice you against Willie Lloyd Tur[illegible] er or affect your ability to render a fair and [illegible] impartial verdict based solely on the evidence?

under the Sixth and Fourteenth Amendments to the Constitution to be tried by an impartial jury. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). This does not entitle the defendant, however, to examine jurors on voir dire about every matter that may prejudice a juror against the defendant. But, where special circumstances exist, a criminal defendant may have a constitutional right to have veniremen questioned on racial prejudice. *Ristaino v. Ross*, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976).

The Supreme Court found such special circumstances in *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973). Ham, a black man, was convicted in a South Carolina court of possession of marijuana. His defense at trial was that he was framed by law enforcement officials because of his civil rights activities. Ham was known throughout the community for his civil rights work. The trial court refused to question the jurors about possible racial prejudice against Ham. The Court found a due process violation in the trial court's failure to interrogate the jurors on the issue of racial bias.

Three years after its decision in *Ham*, the Supreme Court refused to create a per se rule requiring voir dire on racial prejudice in any case where the defendant is of a different race from the victim. *Ristaino v. Ross, supra*. Ross, a black male, was tried in a Massachusetts court for armed robbery, assault and battery with a dangerous weapon and assault and battery with the intent to commit murder. The victim was a white security guard. The Court rejected the court of appeals' decision that such voir dire should be required because the case involved a violent crime committed by a black against a white security guard. Such a holding, the Court said, interpreted *Ham* too broadly. *Ham* represented a fact specific situation in which racial issues were "inextricably bound up with the conduct of the trial." *Ristaino, supra*, 424 U.S. at 597, 96 S.Ct. at 1021. The Court concluded that the mere fact that the victim was white and the defendant was black was less likely to distort the trial than were the special factors present in *Ham*. "The circumstances did not suggest a significant likelihood that racial prejudice might infect Ross' trial." 424 U.S. at 598, 96 S.Ct. at 1022. Thus, voir dire on racial prejudice was not constitutionally mandated.

Turner contends that his case involves special circumstances requiring voir dire on racial prejudice because he is charged with capital murder and that in and of itself is a special circumstance. He also contends that defendants who murder whites are more likely to be sentenced to death and therefore a special circumstance is created by this likelihood.

[3, 4] We reject both contentions. There must exist some special circumstance in the facts surrounding a particular case before such voir dire is constitutionally required. We are of opinion that the nature of the crime or punishment itself is not a special circumstance. Nor is the fact that the victim is white and the defendant black, as *Ristaino* specifically so held. We are also of opinion that the fact that a larger percentage of white victims' assailants are executed than are other races is not a special circumstance. "There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups." *Rosales-Lopez*, infra, 451 U.S. at 190, 101 S.Ct. at 1635.

An even more recent pronouncement from the Supreme Court involving a Mexican defendant confirms that "[o]nly when there are more substantial indications [than a victim of one race and the defendant of another or a defendant of any particular race] of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the juror's ability to deal impartially with the subject amount to an unconstitutional abuse of discretion." *Rosales-Lopez v. United States*, 451 U.S. 182, 190, 101 S.Ct. 1629, 1635, 68 L.Ed.2d 22 (1981).

[5] The broad inquiry in each case must be "... whether under all of the circumstances presented there was a constitution-

ally significant likelihood that, absent questioning about racial prejudice, the jurors would not be 'indifferent as [they stand] unsworne.'" *Ristaino*, 424 U.S. at p. 596, 96 S.Ct. at p. 1021. An examination of all of the circumstances presented here does not indicate there was a constitutionally significant likelihood that absent questioning about racial prejudice the jurors would not be indifferent as they stood unsworn. As Turner concedes, there is nothing special in the facts surrounding this case to suggest racial antagonism. That being true, the trial court did not commit constitutional error by refusing to ask the jurors the question copied in footnote 4 in the margin.

II

Turner next contends that the exclusion of juror Samuel Cypress for cause violated his Sixth and Fourteenth Amendment rights. Cypress was struck for cause over defense objections after the following colloquy:

> Now, Mr. Cypress, do you have any religious or conscientious scruples or objections against the imposition of the death penalty?
>
> Mr. Cypress: Well, really, I don't go for the death penalty.
>
> The Court: Can you say yes or no to that question?
>
> Mr. Cypress: No.
>
> The Court: Or yes?
>
> Mr. Cypress: Do I have any objection?
>
> The Court: Yes.
>
> Mr. Cypress: Yes.
>
> The Court: Is your objection to the death penalty absolute?
>
> Mr. Cypress: Well, I would say yes.
>
> The Court: Could you in a proper case impose the death penalty?
>
> Mr. Cypress: Didn't hear.
>
> The Court: Could you in a proper case impose the death penalty?
>
> Mr. Cypress: Well, I can't see where it helps any.

Turner argues that Cypress' responses do not show that he was irrevocably committed before trial to vote against the death penalty. In particular, Turner challenges the Virginia court's interpretation of Cypress' response that he did not see that it helped any when queried about whether he could impose the death penalty.

In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and again in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), the Court held that the State may strike for cause jurors whose opposition to the death penalty would prevent them from considering all the penalties provided by state law. That opposition must be such as to lead the juror to either ignore the law or violate his oath as a juror. The fact that a juror may be opposed to the death penalty does not provide grounds to strike him for cause as long as he could consider imposition of the death penalty in an appropriate case.

[6] In this case, the state trial judge, after questioning Cypress and observing his demeanor, determined that cause existed to strike him from the jury panel. The district court refused to disturb the trial judge's findings, and we agree.

Under 28 U.S.C. § 2254(d), factual findings such as those of a state trial court[5] are presumed to be correct in a habeas corpus action in federal court unless, among other things not applicable here, those determinations are not fairly supported by the record. That standard applies to our consideration of Cypress' qualification to serve on the jury. In *Patton v. Yount*, — U.S. —, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984), a case involving the partiality of a juror, much the same question as that presented here, the Court decided that, on habeas corpus review, when the question was whether or not a juror could set aside an opinion, the presumption of § 2254(d) applied, and that "special def-

5. The trial court's finding was specifically affirmed by the Virginia Supreme Court. 273 S.E.2d at p. 43.

erence" should be given to the finding of the trial court. The Court held that the juror in question was properly seated despite some ambiguous answers, much as here. "Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially." at ——, 104 S.Ct. at 2893.

The question we must address therefore is whether there is fair support in the record for the trial court's conclusion that Cypress' opposition to the death penalty was absolute. We hold that the record supports that conclusion. Cypress stated that he opposed imposition of the death penalty. Following further questioning, Cypress said that this opposition was absolute. While his response to the trial judge's last question may have been ambiguous, such ambiguity has been resolved by the trial judge whose "... resolution of such questions is entitled, even on direct appeal, to special deference." at ——, 104 S.Ct. at 2892. The trial judge asked the proper questions required by *Witherspoon* and *Adams*. He was in the best position to observe Cypress' demeanor and intonation during voir dire. We refuse to disturb his decision that Cypress' opposition to the death penalty was absolute.

[7] We do not construe *Keeten v. Garrison*, 742 F.2d 129 (4th Cir., 1984), to require us to make a de novo review of Cypress' qualification to serve on the jury, as Turner argues. Rather, we think it is consistent with *Patton*. But, assuming arguendo Turner's construction of *Keeten*, our bolding would be the same. The trial judge could have reasonably concluded, after considering Cypress' responses in toto that he could not consider imposition of the death penalty in the proper circumstance, and we think his finding is supported by the record.

III

As Turner notes in his brief, this court's recent opinion in *Keeten* precludes his argument that his constitutional right to an impartial jury was violated because a death qualified jury is claimed to be biased in favor of the prosecution. *Keeten* was recently reaffirmed by this court in *Briley v. Booker*, (1984).

IV

[8] Turner claims error in the district court's denial of an evidentiary hearing on his claim that he was denied effective assistance of counsel at the penalty phase of his trial. He does not claim ineffective assistance at the stage of the trial ascertaining guilt or innocence. The district court found that Turner's trial was not a case in which counsel had failed to present any evidence, or only evidence of marginal value, and concluded that Turner's attorneys had presented evidence of his psychological history and mental state at the time of the murder, which are matters in mitigation specifically included in Virginia Code § 19.2-264.4. It concluded that counsel had complied with the standard set out in *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir.1977), cert. den. 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978), and that no evidentiary hearing was required. We agree.

[9–11] When a habeas petitioner presents facts which, if proved, would entitle him to habeas corpus relief, a federal court can receive that evidence at a hearing. *Townsend v. Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 756, 9 L.Ed.2d 770 (1963). An evidentiary hearing in a federal habeas corpus proceeding is required only if the habeas petitioner establishes one or more of the enumerated criteria of 28 U.S.C. § 2254(d) or in *Townsend*, supra, at 312–318, 83 S.Ct. at 756–759. *Shaw v. Martin*, 733 F.2d 304 (4th Cir.1984). Where a state court has decided the merits of a claim but made no express findings of fact, the district court may be able to reconstruct those findings without a hearing. Of course no hearing is required if the facts alleged by the petitioner and assumed to be true are insufficient to support a claim.

On appeal, Turner confines himself wholly to the defense attorneys' treatment of the psychological evidence at the penalty stage of the trial, if we include the side claim that the attorneys did not produce "the corroborating evidence necessary to make credible a psychological or mitigating defense." To place this contention in proper perspective, a brief review of the claim is in order. Following Turner's conviction, he employed other counsel to prosecute his appeal. These are the same attorneys who are presently in the case. They have represented Turner at least since May 1980, the date of filing of Turner's brief in the Supreme Court of Virginia in the appeal of the criminal conviction.

Following affirmance of Turner's conviction, he filed a petition for habeas corpus in the state court. So far as concerns us here, the only pertinent contention there made was that "counsel failed to develop and present adequately the psychiatric evidence sufficient to support a finding of the presence of mitigating mental abnormalities." That petition was dismissed and no written elucidation or explanation of the contention was ever brought to the attention of the trial court prior to its order of February 10, 1982 dismissing the petition. On April 6, 1982, however, Turner's attorneys filed a paper with the trial court giving their version of the statement of facts, including what took place at the hearing. The Commonwealth did likewise. On June 3, 1982, the trial judge signed a statement of facts which included the fact that at oral argument petitioner's attorneys had proffered that the defense attorneys had not consulted any psychiatrist other than Dr. Bransfield and that the defense attorneys had not adequately researched capital murder statutes in other jurisdictions regarding the definition and application of the mitigating factors set forth in Virginia Code § 19.2-264.4B. This latter finding, however, does not concern us here in view of the course the trial and this appeal have taken. The Virginia Supreme Court denied a petition for appeal from the trial court's dismissal of the habeas corpus petition on January 11, 1983. In that order it relied on *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), and *Marzullo*, supra. The Supreme Court of the United States denied certiorari. — U.S. —, 103 S.Ct. 2465, 77 L.Ed.2d 1341 (1983).

Next, Turner applied for federal habeas corpus relief in the district court in the Eastern District of Virginia in the case at hand. In his petition, the allegations quoted above from the petition in the state court were copied *in haec verba*. That petition was likewise dismissed. The first time that any mention was ever made in this case of any missing witness with respect to the sentencing phase of the case, or failure to consult another psychiatrist, or any other failure with respect to the treatment of the psychiatric evidence, was when a motion was made on July 2, 1984 to alter or amend the judgment of the district court. At that time it was claimed that the defense attorneys should have called Turner's younger sister, his uncle, and two people who would say that they were willing to back Turner in opening a barber shop after release from prison. Also, Turner then filed his affidavit seeking to explain the circumstances surrounding his earlier crimes, together with some documents corroborating some good incidents in his career while imprisoned.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland v. Washington*, — U.S. —, —, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). It is by that standard that Turner's attorneys are to be measured.

[12] So, we examine the attorneys' actions with respect to the psychiatric testimony. To begin with, they moved the court that they be permitted to employ a private psychiatrist to examine Turner. The court instead appointed a certain Dr. W.F. Daughtrey, Jr., a general practitioner, to examine and evaluate Turner and to make a report in writing to the court and to the attorneys in accordance with then effective § 19.2-169 of the Code of Virginia.

Dr. Daughtrey reported that in his opinion Turner was mentally competent to stand trial. Being of opinion, however, that more extensive examination, evaluation and observation was desirable, the court then committed Turner to Central State Hospital, a mental hospital, for additional examination, evaluation and observation. The hospital was ordered to report to the court and to the attorneys, which it did. While there, Turner underwent psychiatric, psychological and sociological evaluation by the staff. The report from Central State Hospital was that Turner suffered from personality disorders and anti-social personality, each mild. It recommended that he be returned to the court for disposition of the pending charges. Turner's attorneys persisted, however, that Turner needed further examination, and the court ordered that the attorneys be permitted to employ Dr. Bransfield.[6] Dr. Bransfield, after examination of Turner and after psychological testing by Dr. Erwin F. Sacks, PhD and one of Dr. Bransfield's associates, submitted a long and detailed report to the effect that Turner was competent to stand trial. While Dr. Bransfield did not feel that Turner had schizophrenia, he was of opinion that a few psychiatrists would diagnose Turner as having latent schizophrenia. He also was of opinion that Turner in times of stress might display paranoid tendencies but that Turner had not shown a paranoid psychosis. He also thought that Turner had an anti-social personality and was not under an irresistible impulse at the time of the murder.

At the sentencing phase, Turner called one of the psychiatrists who had examined him, Dr. Bransfield, as well as his mother, his cousin and his aunt. He also called Officer Bain and the police chief. The officers were obviously called to prove that Turner was placed in a position of stress upon finding out that the silent alarm had been set off and upon the appearance of Officer Bain. The family witnesses, of course, had good things to say about Turner, how he was good to his family and had had a very disadvantaged childhood. His mother also testified, in corroboration of Dr. Bransfield, that at or about the time of the shooting she had had to call the local police about an incident at home and that she had told the police that Turner needed treatment for his mind. She said that he had been in a daze and that she was afraid that he might hurt somebody if they would push him. Dr. Bransfield had testified that if Turner believed he was cornered he might react in a violent way and he felt that if Turner had had treatment at the time of the shooting that Smith would not have been killed.

Dr. Bransfield, all in all, was quite a good witness for Turner. The gist of his testimony is contained in one of his answers on cross-examination:

> "He had psychotic symptoms which were present for at least three weeks before July 12th [the day of the murder]. I could list what those symptoms are. They seemed to influence his behavior. I could not prove—there was no evidence that I could show that his shooting Mr. Smith was fully and completely a psychotic act; however, I do feel that he was affected by psychotic problems which impaired his ability to perform in a rational manner and the symptoms that he had, I could list."

Earlier, the conclusion of Dr. Bransfield's direct examination was as follows:

> Q ... [D]o you have an opinion with reasonable medical certainty as to whether this crime was committed while Willie Turner was under the influence of extreme mental or emotional disturbance?
>
> A Yes, I do have an opinion.
>
> Q And what is that opinion, sir?

6. We note that the orders for the various psychiatric examinations of Turner were entered by the General District Court before Turner was indicted. In Virginia, the General District Court in the usual course of things has jurisdiction to ascertain probable cause and decide whether a defendant will be bound to a grand jury. Circuit Courts are the trial courts of general jurisdiction.

A That I feel he was under the influence of mental disturbance while he was committing the crime.

Thus, Dr. Bransfield's testimony tended to show one of the facts which may tend to show mitigation specifically mentioned in the Virginia statute, "the influence of extreme mental or emotional disturbance," and also touched upon another like statutory factor, "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." See Va.Code § 19.2-264.4. In view of Dr. Bransfield's testimony, it is seen that the contention in both petitions for habeas corpus, that the attorneys "failed to develop and present adequately the psychiatric evidence sufficient to support a finding of the presence of mitigating mental abnormalities," is little better than frivolous. The evidence was there for the jury to consider. The jury simply chose not to found its verdict upon that mitigating circumstance.

The claim now made on appeal is that Turner's attorneys "mishandl[ed]" "the psychiatric testimony and mitigating evidence" which was "essentially a product of ignorance." The claim goes that the attorneys "did not know the diagnostic implications or the potential dangers from cross examination of a diagnosis of anti-social personality;" they "had not discussed with Dr. Bransfield the definitions of the mitigating and aggravating circumstances on which he would be expected to comment;" and "did not acquire the degree of expertise in psychiatric matters necessary to fully develop the psychiatric defense."

The record belies the charges. The attorneys had caused three examinations of Turner, the preliminary examination by a general practitioner and two by psychiatric experts. While we are not told what are the diagnostic implications or potential dangers from cross examination of a diagnosis of an anti-social personality, the attorneys were obviously prepared to have more than one psychiatrist testify, for they so advised the court in the record. Dr. Bransfield's testimony was as good as it could have been. We think Turner's attorneys, in handling the psychiatric defense, did a professional job in every sense of the word. They had a good witness who testified as favorably in Turner's behalf as could have been wanted. Their examination of the witness was conducted in a skillful and knowledgeable manner. We are thus of opinion that their performance in Turner's behalf was reasonable under prevailing professional norms. Turner's present reliance on other possible theories of defense are nothing more than afterthoughts, we think, brought into play after the best defense, that of direct evidence on the direct question involved, had been tried but found wanting through no fault of the attorneys. The question of Turner's state of mind and the degree of his responsibility for his acts at the time of the shooting was purely a jury question. By its verdict the jury simply found that the mitigating factors were insufficient, a matter entirely within its province. No fault of any kind can be laid to the attorneys for this result.[7]

V

Turner challenges the use of the vileness criterion in this case as being violative of his rights under the Eighth and Fourteenth Amendments to the Constitution.

Under Virginia law the death penalty may be imposed upon a defendant if the jury finds beyond a reasonable doubt that "there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society; [the dangerousness criterion] *or* that his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or

7. With respect to the claim that the attorneys should have shopped around for another psychiatrist, we have excluded that ground in *Barfield v. Harris*, 719 F.2d 58, 63 (4th Cir.1983), affirming 540 F.Supp. 451 (E.D.N.C.1982), and we do not think the claim has any validity here.

'aggravated battery to the victim" (the vileness criterion) Va.Code § 19.2-264.4C (emphasis added).

The Virginia Supreme Court has construed the vileness component of § 19.2-264.4C to include three separate and distinct features, those being torture, depravity of mind or aggravated battery. Proof of only one of these factors is sufficient to support a sentence of death. *Bunch v. Commonwealth*, 225 Va. 423, 432, 304 S.E.2d 271 (1983). Even more importantly, the Virginia Court has also given a limiting construction to two components of the vileness criterion. Depravity of mind has been construed to mean "a degree of moral turpitude and physical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Aggravated battery is "a battery which qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder." *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135, 149 (1978).

[12] The jury here was given a verdict form setting out both statutory aggravating factors (dangerousness and vileness) connected by the conjunctive "and/or". The jury unanimously imposed a sentence of death,[8] returning the verdict form without striking either the "and" or the "or".[9] Thus, this case differs from *Briley v. Bass*, 742 F.2d 155 (4th Cir.1984), where the jury struck the word "or" and unanimously found both aggravating factors. There, the court did not need to consider a similar constitutional attack on the vileness criterion of § 19.2-264.4C because the dangerousness criterion was sufficient. *Briley* at pp. 165–166. Because we cannot be sure which factor the jury relied upon in awarding the death sentence in this case, we consider Turner's attacks on the vileness criterion.[10]

[14] Turner does not attack the constitutionality of this aggravating factor on its face, as that issue has been disposed of in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Instead, he attacks its constitutionality as applied to him, relying upon *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion).

In *Godfrey* the Supreme Court reversed the imposition of the death penalty in a capital murder case because the Georgia vileness criterion was unconstitutionally applied to the defendant. Godfrey had been having marital problems with his wife of 28 years. He had a history of a drinking problem and violent behavior toward his wife. Godfrey's wife had left him and had filed suit for divorce. His attempts at reconciliation were rebuffed. Mrs. Godfrey moved in with her mother, who Godfrey felt encouraged the separation.

One evening immediately after arguing with his wife over the telephone, Godfrey took his shotgun and walked a short way to his mother-in-law's home. He peered through the window and saw his wife, his 11 year old daughter, and his mother-in-law. He immediately shot his wife in the forehead, killing her instantly. He then entered the trailer and struck and injured his daughter. He then fired one shot at his

8. The jury verdict read as follows:

"We, the Jury, on the issue joined, having found the defendant guilty of Capital Murder of W. Jack Smith, Jr., as charged in the Indictment, and having found that,

after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society,

and/or

his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind; aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder,

and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death."

9. We agree with the Virginia Supreme Court that the better practice would be for the trial court to poll the jury as to which aggravating factor they found. *Turner*, supra, 273 S.E.2d at 45 n. 12.

10. Turner does not challenge the dangerousness criterion. There is ample evidence in the record to support such a verdict. *Turner*, supra, 273 S.E.2d at 44 n. 11 and 273 S.E.2d at 45.

mother-in-law, hitting her in the head and killing her instantly. Godfrey immediately called the police, surrendered and confessed to the murders. 446 U.S. 424–426, 100 S.Ct. 1763–1764.

Godfrey was found guilty of two counts of murder and one count of aggravated assault. He was sentenced to death under Georgia's statute providing as aggravating circumstances that the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." [11] At the sentencing stage of trial, the prosecutor conceded that the case did not involve torture or aggravated battery. The jury found that "the offense of murder was outrageously or wantonly vile, horrible or inhuman." The Georgia Supreme Court affirmed the imposition of the death penalty.

The Supreme Court reversed. The Court first noted that a State's sentencing scheme must provide "a meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Id. at 427, 100 S.Ct. at 1764, quoting *Furman v. Georgia*, 408 U.S. 238, 313, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 (White, J. concurring). The sentencer must be given clear and objective standards to follow in the application of the death penalty. Those "specific and detailed" guidelines enable the courts to rationally review the sentence imposed.

The Court found no such guidance present in *Godfrey*. Nothing in the words "outrageously or wantonly vile, horrible or inhuman" alone distinguished this murder from others not eligible for the death penalty. The Court reached this conclusion after reviewing Georgia case law giving the phrase a limited construction that required a demonstration that the offense involved torture, depravity of mind or aggravated battery. Depravity of mind had been defined in Georgia to mean the state of mind leading to torture or aggravated battery. But in Godfrey's case the prosecution had conceded that no torture or aggravated battery was present. Thus, the murders did not fit within the limiting criteria set out by the Georgia Supreme Court.

The Court held in *Godfrey* that the phrase "outrageously or wantonly vile, horrible or inhuman" in and of itself had not been given a constitutional construction by the Georgia Supreme Court. The Court concluded that "[t]he petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes." Id. 446 U.S. at 433, 100 S.Ct. at 1767.

On direct appeal, the Virginia Supreme Court rejected Turner's argument that *Godfrey* required reversal of his death sentence. It construed the statute to require not only outrageously or wantonly vile, horrible or inhuman conduct, but also that such conduct involve either torture, an aggravated battery of the victim, or the perpetrator's depravity of mind. The Court then found, applying its limiting precedent of *Smith v. Commonwealth*, that the evidence established an aggravated battery which is a " 'battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish the act of murder.' " 248 S.E.2d at 149; 273 S.E.2d at 45. The court then found that, in all events, the dangerousness criterion of the statute had been met. Turner had been convicted previously of malicious maiming, escape, unlawful wounding, malicious wounding, and second degree murder, four of the offenses occurring while he was in prison. The validity of this finding is not questioned on appeal.

We agree with the analysis by the Virginia Supreme Court. The fatal weakness in *Godfrey* was the unconstitutionally broad construction given the vileness criterion in the absence of both torture and

11. This language is identical to that of Va.Code § 19.2-264.4C.

aggravated battery by the Georgia Supreme Court. That weakness is not present here. The Virginia Supreme Court has given a limited construction to the vileness criterion and applied that limited construction here.

We also note that the facts of this case are not even similar facts to those upon which the Supreme Court relied in *Godfrey*. In contrast, the murder here was cold-blooded and calculated, involving no element of emotional trauma as was present in *Godfrey*. Turner initially shot Smith for no reason at all. While Smith lay alive but helpless and while Officer Bain pleaded, Turner fired two shots into Smith's chest after stating that he was going to kill him for snitching on him. No comparison can be drawn between the facts of *Godfrey* and the deliberate malicious murder presented in this case. We reject Turner's contention that his crime was not so vile as to justify the imposition of death. The case fits within the constitutionally limited construction of the vileness criterion established by the Virginia Supreme Court, and we are of opinion Virginia's death penalty provisions were constitutionally applied.

[15] On a related subject, we find no constitutional deficiency in the instructions given to the jury at the sentencing stage of the trial. The instructions set out the appropriate mitigating factors of § 19.2-264.4, and the jury was also instructed as to the limiting definition of aggravated battery as expressed in *Smith*. The trial judge carefully instructed the jury that "[w]here the evidence is susceptible to two interpretations, one consistent with the imposition of the death penalty, and the other with the imposition of life imprisonment, you should not adopt that interpretation which is consistent with imposition of the death penalty." We do not think that *Godfrey* requires that a jury be instructed on each term in the aggravating circumstances. We see no reason why this jury should not have understood the terms of the instructions given. *Cape v. Francis*, 741 F.2d 1287 (11th Cir.1984).

The constitutional flaw of *Godfrey*, the Georgia Court's failure to give a constitutional construction to the vileness criterion, is not present here. The Virginia Court has limited the breadth of the criterion in such a manner that its application here was neither arbitrary nor capricious.[12] The jury was properly instructed. Nothing else was constitutionally required.

VI

[16] While deliberating on the sentence to be imposed, the jury returned and asked the judge what life imprisonment entailed. The judge responded that the jury must consider only the two alternatives set out in the instructions, those being death or life imprisonment.

Turner contends that the due process requires that the jury be instructed that a prisoner may be entitled to parole and that the parole board is permitted to grant parole only after finding that the prisoner's release will serve his interests and the interests of society.

It is settled that such an instruction is not permissible under Virginia law. *Clark v. Commonwealth*, supra; *Hinton v. Commonwealth*, 219 Va. 492, 247 S.E.2d 704 (1978).

In *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), the Court upheld as constitutional a California law requiring that a jury in a capital case be instructed of the governor's power to commute a sentence of life without the

12. The Virginia Supreme Court has consistently applied the limiting provisions of *Smith v. Commonwealth*, supra, in its review of cases involving the death penalty. *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371 (1984) (aggravated battery and depravity of mind); *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (1983) (aggravated battery and depravity of mind); *Whitley v. Commonwealth*, 223 Va. 66, 286 S.E.2d 162 (1982) (aggravated battery); *(James) Briley v. Commonwealth*, 221 Va. 563, 273 S.E.2d 57 (1980) (aggravated battery and depravity of mind); *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979) (depravity of mind).

possibility of parole. The Court made clear that while such disclosure is constitutionally permissible it is not constitutionally required. It also upheld the failure or refusal of the trial court to instruct the jury on the governor's power to commute a death sentence. In arriving at its decision, the Court noted: "[o]ur conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their state should not be permitted to consider the governor's power to commute a sentence." In footnote 30 the Court stated that "[m]any state courts have held it improper for the jury to consider or to be informed—through argument or instruction—of the possibility of commutation, pardon or parole." Id. at ——, 103 S.Ct. at 3459. While not exactly on point, we think *Ramos* indicates that the Court would decide that while it is constitutionally permissible to instruct the jury on the subject of parole, such an instruction is not constitutionally required. We so hold. Accord *O'Bryan v. Estelle*, 714 F.2d 365, esp. 389 (5th Cir.1983).

We have considered each of the issues raised by Turner in his appeal and find that he had a constitutionally fair trial.

Our stay of the state court's order to impose its sentence is hereby dissolved.

The judgment of the district court is AFFIRMED.

JAMES DICKSON PHILLIPS, Circuit Judge, specially concurring:

I concur in the judgment and in all of the opinion except that part dealing with the claim of due process denial in refusing to question prospective jurors about the possibility of racial bias. On that point I believe the majority opinion puts too restrictive a reading on the circumstances that may entitle a criminal defendant, as a matter of due process, to have prospective jurors so questioned. But because I further believe that the circumstances giving rise to the right were not demonstrated here under a proper application of the principle, I concur in the court's conclusion that no due process denial was established.

As I read *Rosales-Lopez v. United States*, 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981); *Ristaino v. Ross*, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976); and *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973), in conjunction, they yield the following principles.

The fact alone that defendant is of a different race than the crime victim is not a circumstance giving rise to the due process right, *Ristaino*, 424 U.S. at 596, 597, 96 S.Ct. at 1021, 1022; nor is this altered by the nature of the crime charged or the punishment possible, *see Ristaino*, 424 U.S. at 596 n. 8, 96 S.Ct. at 1021 n. 8 (generally rejecting *per se* approach based upon non-case-specific factors such as violent nature of crime). But special circumstances giving rise to the right may be present in a case in which racial issues are "inextricably bound up with the conduct of the trial." *Id.* at 597, 96 S.Ct. at 1021 (so interpreting basis of right recognized in *Ham* where racial prejudice against defendant was raised as defense on the merits). And, aside from specific trial issues, "more substantial indications [than race differences alone] of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case" may trigger the right. *Rosales-Lopez*, 451 U.S. at 190, 101 S.Ct. at 1635 (dicta: constitutional test stated in applying broader supervisory rule for federal courts); *see also Ristaino*, 424 U.S. at 598, 96 S.Ct. at 1022 (constitutional right might arise not only from specific trial issues but from "racial factors ... of comparable significance").

But as I read the majority opinion, it reads these decisions more restrictively in holding that only "special circumstances in the facts surrounding a particular trial" invoke the constitutional right, and that "the fact that a larger percentage of white victims' assailants are executed" may not be such a special circumstance. If by this the majority is saying that only when *Ham*-type racial issues are bound up in the merits of a criminal trial can the due pro-

...opez v. United ...11 S.Ct. 1629, 68 ...ino v. Ross, 424 ... 47 L.Ed.2d 258 ...th Carolina, 409 ...L.Ed.2d 46 (1973), ...ld the following

...efendant is of a ...me victim is not a ...o the due process ... at 596, 597, 96 ...s this altered by ... charged or the ...'istaino, 424 U.S. ...11 n. 8 (generally ... based upon non- ...as violent nature ...rcumstances giv- ...be present in a ...are "inextricably ...ct of the trial." ... (so interpreting ... in *Ham* where ... defendant was ... merits). And, ...tues, "more sub- ...race differences ... racial or ethnic ...ors in a particu- ...right. *Rosales-* ...11 S.Ct. at 1635 ...stated in apply- ...ule for federal ... 424 U.S. at 598, ...nal right might ... trial issues but ... comparable sig-

...rity opinion, it ... restrictively in ...rcumstances in ...'articular trial" ...right, and that ...entage of white ...uted" may not ...nce. If by this ...nly when *Ham-* ...nd up in the ...n the due pro-

cess right arise, I cannot agree. Obviously, if this were correct, it would follow that factors related solely to likely juror attitudes independent of specific issues in a particular case—including statistical demonstrations of jury propensities—would always be irrelevant.

But, as indicated, I do not read the authoritative Supreme Court decisions to limit the right to *Ham*-type situations. I believe that not only specific racial issues in the particular case but a demonstrated likelihood of racial prejudice affecting the "particular" jury, irrespective of specific issues, may invoke the constitutional right. And I would not be prepared flatly to rule out as possible means, among others, of demonstrating such a likelihood scientifically sound statistical evidence related to community attitudes as reflected in jury performance in sufficient samples of comparable cases.

But to demonstrate that such a propensity was sufficiently likely to afflict the "particular" jury in a given case, I think the evidence offered—whatever its source and content—would have to be much more focussed in time and geographical terms upon the very community from which the particular jury venire is drawn than was the evidence here advanced by Turner. That evidence consisted only of the following:

(1) A study by Bowers and Pierce of post-*Furman v. Georgia* data collected through December 1977 from Georgia, Florida, Texas, Alabama and Ohio, which revealed that 14.59% of blacks killing whites received the death penalty, compared to 2.66% of whites killing whites, 3.54% of blacks killing blacks, and 0.50% of whites killing blacks;

(2) a 1983 study by Gross and Mauro of data through 1980 from Oklahoma, North Carolina, Mississippi, Virginia and Arkansas. The Virginia data focused on 19 cases out of 1389 criminal homicides, these cases being chosen to control for attitudes about the degree of atrocity involved in the homicide. The statistical analysis of Virginia data showed 8.2% of blacks killing whites receiving the death sentence compared to 1.3% of the whites killing whites and 0.60% of blacks killing blacks. No white had received the death penalty for killing a black under Virginia's 1977 capital punishment statute.

This evidence, whatever its general statistical reliability as a measure of community attitudes over the wide expanses of area and time covered, is simply too diffused in its depiction of likely community, hence juror, attitudes in this particular case to invoke the right. But I am not prepared to hold, as I think the majority opinion implies, that the requisite likelihood, hence the due process right, can never be shown by statistically sound evidence of particular community attitudes as reflected in sufficiently contemporary jury verdicts in comparable situations.

UNITED STATES of America, Appellee,

v.

David Thomas HAWKES, Appellant.

UNITED STATES of America, Appellee,

v.

Sylvia Ines HAWKES, Appellant.

Nos. 84-5125(L), 84-5126.

United States Court of Appeals, Fourth Circuit.

Argued Nov. 2, 1984.

Decided Jan. 29, 1985.

Defendants were convicted in the United States District Court for the Southern District of West Virginia, at Bluefield, John T. Copenhaver, Jr., J., of unlawfully, knowingly and intentionally aiding and abetting each other in manufacture, growing, cultivation and possession with inten-

Supreme Court of the United States

No. 84-6646

Willie Lloyd Turner,

Petitioner,

v.

Allyn R. Sielaff, Director, Virginia Department of Corrections

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth ------- Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

May 13, 1985